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Sup. Court

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 284 74

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

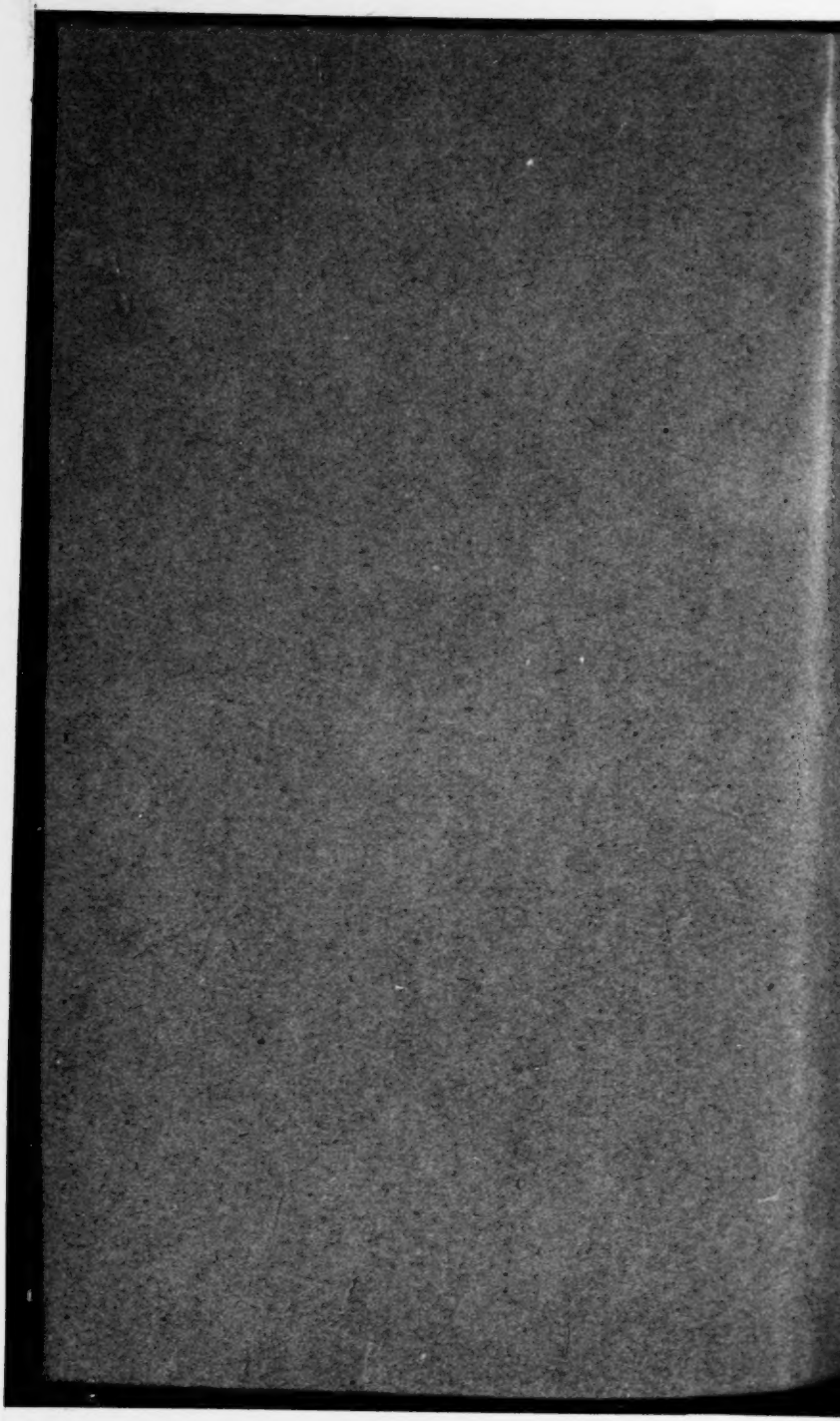
vs.

EMIL REISS, JAMES EDWARD REISS, FREDERICK REISS, AND HENRY JACQUES REISS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JUNE 4, 1900.

(17,792.)



(17,792.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 307.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

EMIL REISS, JAMES EDWARD REISS, FREDERICK REISS, AND HENRY JACQUES REISS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
EMIL REISS ET AL., Defendants in Error.

Transcript of Record.

Error to the circuit court of the United States for the southern district of New York.

United States circuit court of appeals, second circuit. Filed Mar. 9, 1900. William Parkin, clerk.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Emil Reiss, James Edward Reiss, Frederick Reiss and Henry Jacques Reiss, plaintiffs, and The Texas and Pacific Railway Company, defendant, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, as is said and appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States circuit court of appeals for the second circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 13th day of March, 1900, that the record and proceedings aforesaid being inspected, the said judges of the United States circuit court of appeals for the second circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13th day of February, in the year of our Lord one thousand nine hundred, and of the
2 Independence of the United States the one hundred and twenty-fourth.

[SEAL.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the — District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages, numbered from three to 172, inclusive, contain a true and complete transcript of the record and proceedings had in the said court in the cause of Emil Reiss, James Edward Reiss, Frederick Reiss and Henry Jacques Reiss, plaintiffs, defendants in error, against The Texas and Pacific Railway Company, defendant, plaintiff in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-seventh day of February, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

[SEAL.] (Stamp.)

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) The U. S. circuit court of appeals for the second circuit. Emil Reiss *et al.*, plaintiffs in error, *vs.* The Texas and Pacific Railway Company, defendant in error. Writ of error. Rush Taggart, attorney for plaintiffs in error. Due service of a copy of the within writ of error is hereby admitted this 14th day of February, 1900. Evarts, Choate & Beaman, attorneys for defendant in error. U. S. circuit court. Filed Feb. 14, 1900. John A. Shields, clerk.

3

United States Circuit Court, Southern District of New York.

EMIL REISS, JAMES EDWARD REISS, FREDERICK Reiss, and Henry Jacques Reiss *against* THE TEXAS AND PACIFIC RAILWAY COMPANY. } Action No. 1.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the city of New York, this 17th day of August, in the year one thousand eight hundred and ninety-five.

[SEAL.]

JOHN A. SHIELDS, *Clerk.*

EVARTS, CHOATE & BEAMAN, *Plaintiffs' Attorneys.*

Office and post-office address, No. 52 Wall street, New York city.

4 United States Circuit Court, Southern District of New York.

EMIL REISS, JAMES EDWARD REISS, FREDERICK REISS, and Henry Jacques Reiss
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.
} Action No. 1.

The plaintiffs herein, by Evarts, Choate & Beaman, their attorneys, complain of the defendant, The Texas and Pacific Railway Company, and allege upon information and belief as follows:

First. At all the times hereinafter mentioned the plaintiffs were and are now partners doing business as cotton merchants in the city of Liverpool, England, under the firm name of Reiss Brothers, and are subjects of the Queen of Great Britain and Ireland.

Second. At all the said times the defendant was and now is a railroad corporation, duly created and existing under and by virtue of an act of Congress of the United States of America, approved March 3, 1871, and was and is now engaged in conducting the business of a common carrier of merchandise for hire from various places in the State of Texas to Westwego, in the State of Louisiana, and was and is an inhabitant of the southern district of New York.

Third. Heretofore, and in the month of October, 1894, at
5 Temple, in the State of Texas, the plaintiffs delivered to the said defendant, as such common carrier, 200 bales of cotton, weighing 110,071 pounds, and the defendant then and there received the same and then and there undertook and agreed, as a common carrier as aforesaid, to carry the same, safely and securely, at a through price or rate of freight from the said place of shipment to Bremen, Germany, by way of New Orleans, and thence to Bremen, Germany, by the Elder, Dempster & Co.'s line of steamships, and there to deliver the same to the plaintiffs upon the payment of freight therefor.

Fourth. The said defendant has failed to keep its said agreements and to carry safely said 200 bales of cotton to Bremen aforesaid and there deliver the same to the plaintiffs, although the plaintiffs have duly demanded delivery thereof, and although they have been at all times ready and willing to pay the said freight for such carriage; and through the negligence and carelessness of the defendant and without the fault of the plaintiffs, said 200 bales of cotton, weighing upwards of 110,071 pounds, and of the value of seven thousand one hundred and fifty-four and $\frac{61}{100}$ dollars, were, on or about the twelfth day of November, 1894, wholly destroyed by fire at Westwego, in the State of Louisiana aforesaid, at which time and place the same were in the possession of the defendant in the course of such carriage and as a common carrier as aforesaid. The bales so destroyed were marked as follows: 100 bales marked S I 4 X, and 100 bales marked P O C J.

Fifth. The plaintiffs have duly demanded the payment to them by the defendant of the said value of the said 200 bales of cotton thus destroyed, and have duly performed all the acts necessary for them

to do under and by virtue of said agreements, but the defendant has refused to pay the plaintiffs the value of the bales of cotton destroyed as aforesaid, or any part thereof, although the defend-
6 ant has admitted that said bales of cotton were destroyed by fire at Westwego aforesaid.

Wherefore, the plaintiffs demand judgment against the defendant for the sum of seven thousand one hundred and fifty-four and $\frac{61}{100}$ dollars, with interest thereon from the 12th day of November, 1894, besides the costs of this action.

EVARTS, CHOATE & BEAMAN,
Attorneys for Plaintiffs, No. 52 Wall Street,
New York City, New York.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

I, Treadwell Cleveland, being duly sworn, depose and say as follows: I am one of the attorneys and of counsel for the plaintiffs in the above-entitled action and have read the foregoing complaint and know the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true. The grounds of my belief as to all the matters in said complaint not stated upon my knowledge are as follows, namely, the possession of the original documents relating to the shipment and value of the cotton and communications received from the defendant and others in relation to its destruction.

The reason why this verification is not made by the plaintiffs is that the plaintiffs do not reside and are not now within the city and county of New York, where the plaintiffs' attorneys reside or have their office.

TREADWELL CLEVELAND.

Sworn to before me this 17th day of August, 1895.

[SEAL.] MARVELLE C. WEBBER,
Notary Public, New York County.

7 (Endorsed:) United States circuit court, southern district of New York. Emil Reiss, James Edward Reiss, Frederick Reiss and Henry Jacques Reiss against The Texas and Pacific Railway Company. Summons and complaint. Action No. 1. Evarts, Choate & Beaman, No. 52 Wall street, New York city, attorneys for the plaintiffs. U. S. circuit court. Filed Dec. 4, 1895. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

EMIL REISS, JAMES EDWARD REISS, FREDERICK Reiss, and Henry Jacques Reiss, Plaintiffs,
against
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant.
} Action No. 1.

The above-named defendant, by Rush Taggart, its attorney (protesting, however, that the court is without jurisdiction, for the reason that the defendant is not an inhabitant of the southern district of New York and not consenting to the said jurisdiction), answers the complaint herein as follows:

First. Said defendant has no knowledge or information sufficient to form a belief as to any or either of the allegations contained in the paragraph or subdivision of said complaint designated first.

Second. That said defendant admits the allegations contained in the paragraph or subdivision of said complaint designated
8 second, save and excepting the allegation that the defendant was and is an inhabitant of the southern district of New York, which said allegation defendant denies.

Third. Said defendant admits that heretofore and in the month of October, 1894, at Temple, in the State of Texas, there was delivered to the defendant by the plaintiff certain cotton, being the number of bales specified in the paragraph or subdivision of said complaint designated third, and destined as therein stated, buf that defendant has no knowledge or information sufficient to form a belief as to the weight of said cotton, and the defendant denies each and every other allegation contained in the said paragraph or subdivision of said complaint.

Fourth. Said defendant admits that 200 bales of said cotton marked as described in the paragraph or subdivision of the said complaint designated fourth, were destroyed by fire at Westwego, in the State of Louisiana, on or about the 12th day of November, 1894; but the defendant denies each and every other allegation in the said paragraph or subdivision contained.

Fifth. Said defendant admits the allegation contained in the paragraph or subdivision of said complaint designated fifth, to the effect that it has refused to pay the plaintiff the value of the cotton destroyed as aforesaid, although admitting that it was destroyed by fire at Westwego; but said defendant denies each and every other allegation in the said fifth paragraph or subdivision contained.

Wherefore, the defendant demands that said complaint may be dismissed with costs.

RUSH TAGGART,
Attorney for the Defendants, No. 195 Broadway,
New York, N. Y.

9 SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Charles E. Satterlee, being duly sworn, says: That he is an officer of the defendant above named, The Texas and Pacific Railway Company, to wit, the treasurer thereof; that he has read the foregoing answer and knows the contents thereof; that the same is true, excepting as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

C. E. SATTERLEE.

Sworn to before me this 18th day of November, 1895.

B. W. T. FOX,

[SEAL.] *Notary Public, Kings County, N. Y.*

Certificate filed in New York county.

(Endorsed:) United States circuit court, southern district of New York. Emil Riess, James Edward Reiss, Frederick Reiss, and Henry Jacques Reiss, plaintiff-, *vs.* The Texas and Pacific Railway Company, defendant. Answer. Rush Taggart, attorney for defendant, 195 Broadway, New York. U. S. circuit court. Filed Nov. 19, 1895. John A. Shields, clerk.

10 At a stated term of the circuit court of the United States of America for the southern district of New York in the second circuit, held at the United States court-rooms, in the borough of Manhattan, in the city of New York, on Tuesday, the second day of January, in the year of our Lord one thousand nine hundred.

Present: The Honorable E. Henry Lacombe, circuit judge.

EMIL REISS ET AL. }
vs. }
TEXAS AND PACIFIC RAILWAY COMPANY. }

Now come the plaintiffs, by Frederick E. Mygatt, Esq., and move the trial of this cause.

Likewise comes the defendant, by Rush Taggart, Esq., its attorney.

Thereupon a jury is impaneled and the cause proceeds to trial.

After hearing the evidence for the respective parties, the argument of counsel, the jury by direction of the court say they find a verdict for the plaintiffs for six thousand seven hundred and five dollars and thirty-eight cents ($6,705.38), and so they say all.

(Extract from minutes.)

JOHN A. SHIELDS, *Clerk.*

11 United States Circuit Court, Southern District of New York.

EMIL REISS, JAMES EDWARD REISS, FREDERICK Reiss, and Henry Jacques Reiss, Plaintiffs,
against
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant.
} Action No. 1.

Judgment Dated January Sixth, 1900.

The issues in this action having on January 2, 1900, duly come on to be tried before Honorable E. Henry Lacombe, United States circuit judge, and a jury, and the trial thereof having duly proceeded on the said second day of January, 1900, and the jury having on the second day of January, 1900, by direction of the court, duly rendered a verdict in favor of the plaintiffs and against the defendant for the sum of six thousand seven hundred and five dollars and thirty-eight cents, and the plaintiffs' costs and disbursements having been duly adjusted in that behalf hereinafter mentioned,

Now, on motion of Evarts, Choate & Beaman, attorneys for the plaintiffs,

It is ordered and adjudged, that the plaintiffs, Emil Reiss, James Edward Reiss, Frederick Reiss and Henry Jacques Reiss, recover from the defendant, The Texas and Pacific Railway Company, the sum of six thousand seven hundred and five dollars and thirty-eight cents, the amount of said verdict, and the further sum
12 of sixty dollars and five cents, the plaintiffs' costs and disbursements as adjusted, amounting in all to the sum of six thousand seven hundred and sixty-five dollars and forty-three cents, and that the plaintiffs have execution against the said defendant therefor.

Judgment signed and entered this sixth day of January, 1900, at 11.25 o'clock a. m.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) U. S. circuit court, southern district of New York. Emil Reiss and others against The Texas and Pacific Railway Company. Judgment. Evarts, Choate & Beaman, attorneys for plaintiffs, 52 Wall street, New York city. U. S. circuit court. Filed Jan. 6, 1900, 11.25 a. m. John A. Shields, clerk.

13 United States Circuit Court, Southern District of New York.

EMIL REISS, JAMES EDWARD REISS, FREDERICK Reiss, and Henry Jacques Reiss, Plaintiffs,
against
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant.
} Action No. 1.

Bill of Exceptions.

Be it remembered that at a stated term of this court, held at the United States court-rooms, in the borough of Manhattan, in the

city of New York, on Tuesday, the second day of January, 1900, the issues in this cause came on for trial before the Hon. E. Henry Lacombe, circuit judge, and a jury, duly impanelled and sworn, and thereupon the plaintiffs, through their counsel, opened their case to the jury, to maintain the issues on their part, as follows, to wit:

Counsel for plaintiffs offered in evidence a stipulation entered into between the parties, at New Orleans, on March 22, 1897, in relation to the bill of lading and the method of proving value.

14 Admitted, marked Plaintiffs' Exhibit A, and made part hereof (printed *post*, at pp. 109 *et seq.*).

Plaintiffs' counsel also offered in evidence a bill of lading dated October 30, 1894, at Temple, Texas.

Admitted, marked Plaintiffs' Exhibit B, and made part hereof (printed *post*, at pp. 112 *et seq.*).

Plaintiffs' counsel further offered in evidence a stipulation entered into between the parties, dated January 3, 1899.

Admitted, marked Plaintiffs' Exhibit C, and made part hereof (printed *post*, at pp. 118 *et seq.*).

Plaintiffs' counsel offers in evidence the invoice covering the cotton in suit.

Admitted, marked Plaintiffs' Exhibit E, and made part hereof (printed *post*, at pp. 121 *et seq.*).

FREDERIC E. MYGATT, sworn and examined as a witness on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. CLEVELAND:

I am an attorney-at-law and one of the assistants in the office of Evarts, Choate & Beaman, the attorneys for the plaintiffs. I have made a calculation in relation to the value of this cotton at the time of its shipment under the bill of lading and the invoice and the stipulation. I have multiplied the weight of the cotton by the price per pound on the date of the bill of lading, according to the stipulation, and I find the gross value of the cotton to be $5,950.72. From that I have subtracted the freight at the rate of 75 cents per hundred pounds, which I make $825.53, leaving the net value of the cotton $5,125.19. I have computed the interest on that from November 12, 1894, to January 2, 1900, and make it $1,580.19, and the total amount $6,705.38.

15 Thereupon the plaintiffs rested their case, and defendant's counsel moved the court to direct a verdict for the defendant, on the testimony already given, on the ground that there was nothing to show where Westwego was.

The COURT: I will deny the motion and give you an exception, and let the testimony in.

Exception by defendant.

Thereupon Mr. Taggart offered the following testimony in behalf of the defendant:

C. G. MILLER, having been duly sworn, being examined by Mr Taggart as a witness on behalf of the defendant, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

My occupation is freight agent of the Texas and Pacific Railway Company, at New Orleans. I am the main freight agent, that is the title. There is a division freight agent and a local freight agent. I am the local freight agent and was such in October and November, 1894. Prior to November 12, 1894, I had been such local freight agent in New Orleans about three years. I am thirty years old. My office was at the foot of Thalia street in the city of New Orleans. My duties as freight agent were generally in charge of the terminals at New Orleans and Westwego, the Texas and Pacific terminals, and the warehouses and yards. The Texas and Pacific Railway Company had in or near New Orleans on November 12, 1894, warehouses, yards and other terminals as follows: The freight depot in New Orleans at the foot of Thalia street, in which my office was located, and the cotton shed and sky lot or cotton warehouse—a cotton warehouse known as the sky lot—this is
16 also near the foot of Thalia street. Then we had the yards at Gouldsboro. That is across the river from our terminals at New Orleans. It is not in the city of New Orleans, it is in Gouldsboro across the river from New Orleans. There are no warehouses in Gouldsboro. We have machine shops there, a round-house, yards containing switches, principally for storing freight, but nothing for the storage of cotton and no cotton sheds or docks there.

Besides these warehouses and yards in New Orleans and Gouldsboro, we had our terminals at Westwego. The dock at Westwego was completed in the early spring of 1893 as I recollect it. The whole business was completed at that time.

Q. What is Westwego, describe it to me; simply this dock and the elevator, is it not, and the ferry?

A. That is the most part of it, yes, sir. In October and November, 1894, I don't think there was but one house within a quarter of a mile of our dock. I can only recollect one. There were some within a half a mile, I should say probably half a dozen. One was a sort of country grocery store as I recollect it, plantation store, and houses for the accommodation of plantation hands.

Q. Did you have any system, and if so what was it, of notifying any steamship company when any particular lot of cotton had arrived or was ready for delivery?

A. Yes, sir. We kept the steamship agents fully advised of the amount of cotton on hand ready for delivery.

Q. Tell me the course of business which the Texas and Pacific Railway Company followed with the Elder, Dempster Steamship Company concerning the shipments of cotton from New Orleans which had been carried by the railroad from points in Texas and brought to New Orleans.

A. You refer now to New Orleans proper or Westwego?

Q. Did you make any distinction?

17 A. We made this distinction, that the cotton for New Orleans proper was drayed to the ship's side, and the cotton brought into New Orleans at Westwego was placed on the wharf from the cars.

The railroad company in the first place made certain contracts with ships or steamship companies. We made contracts in New Orleans with steamship agents for carrying before the cotton would arrive. Very likely we made contracts for the season of 1894, 1895, with every regular steamship agency in New Orleans. There was the Harrison steamship line, which I know of, that we had contracts with; and the West India and Pacific steamship line; Elder, Dempster & Company; Hammond & Company; the French line, or French Commercial line—that line changed its name within the last few years, and I am not sure which name it was going under then; the steamship lines for which Miller, Milletta & Company are agents. The G. L. & S. or L. & H. lines were the other principal cotton lines, and there was the Hamburg-American Packet Company, handled by the same agency. Those are about all the lines I am certain we had contracts with. We should have the original contracts with these various lines that I have mentioned. Those contracts were not called season contracts; the only term we had were "contracts." We had no season contracts, only contracts for specific ports and places.

Q. In addition to these general contracts, this general contract that you had with Elder, Dempster & Company, you also made from time to time, as the season progressed, did you not, special contracts with the same line, Elder, Dempster & Company?

A. We may have had other contracts with Elder, Dempster & Company besides this contract. Oh, yes, we did have. All contracts specified the rate of freight. Letters were not written to Elder, Dempster & Company for each special additional contract. The contracts were usually handled without any letters at all; in fact, it was customary to handle them by making them out in duplicate on a regular printed form, filled out in duplicate, one

18 of which was signed by myself and given to Elder, Dempster & Company or the steamship company, and the other signed by them, which was *returned* by myself.

Q. What was the next step towards the fulfillment of this general contract or any one of the special contracts with Elder, Dempster & Company; I mean the next step taken by the railway company?

A. Well, the next step I presume would be to have the cotton shipped in Texas.

Q. What was the next thing that was done by the railway company?

A. Well, on the arrival of the cotton here it was unloaded.

Q. And after the cotton arrived what next would the Texas and Pacific Railway Company do in connection with Elder, Dempster & Company?

A. They would furnish Elder, Dempster & Company notice of arrival. Those were in the form of transfer slips such as I produce. They are always in the form of transfer slips as to each individual lot, that was our regular recognized course. In sending them those transfer sheets we wrote them a regular letter of transmittal with the transfer sheets. They were not on printed forms, on a regular letter.

Q. What was the next step after you sent a transfer slip to the steamship company?

A. Then it remained for the steamship companies to take delivery of the cotton, send a steamer to Westwego and get it. We would receive a paper from the steamship company, before the steamer arrived at the dock—usually the transfers would be returned to us, either endorsed on the face of the transfer by the steamship agents to deliver the cotton to a certain steamer, or a letter of transmittal returning the transfers. Either practice was in effect.

Q. The practice was for the steamship company to return
19 you your transfer slips, which you had sent to them, with certain particulars filled in by the steamship company, indicating what lots of cotton the steamship company was ready to take delivery of? Is that the fact?

A. Yes, sir; ordinarily that was the case.

Q. Then what was the next step?

A. The next step was for the steamer to go to Westwego and take charge of the cotton.

Q. Before the arrival of the steamship at the dock at Westwego, was there any paper which passed between the steamship company and the railway company, or the railway company and the steamship company, than the papers which you have now described?

A. I was going on to explain that the ship's copies of the bills of lading, if they reached my office prior to the time that the steamer went to the dock—in a number of cases those bills of lading were sent to the steamship companies. Whenever I have spoken in any part of my examination of "ship's copies" of bills of lading, I meant duplicates of the bills of lading which were issued by the agents of the railway company at the various shipping points in Texas. There was no other class of paper that passed before the arrival of the steamship at the dock than the papers of which I have testified.

Upon the arrival of the vessel at the dock the employees of the railway company at Westwego would, in company with some one of the ship's employees—the mate, probably—go around and count the various lots of cotton that were there, and the mate would give us what is termed a "mate's receipt" for that cotton before loading it on the vessel.

Q. And at or shortly prior to the arrival of the steamship the cotton designed for that steamship would be brought out on the dock by the railway employees, would it not?

A. Not necessarily. That would depend upon where the cotton was, and in a number of instances the mate of the steamer
20 would receipt to us for it, and the steamship labor would truck the cotton from where we had it on the dock to the vessel.

Prior to the arrival of the steamship at the dock we never received any document from the ship.

Q. Having received the mate's receipt for the cotton thus counted by the mate destined for shipment upon the steamship, what would you do with those mate's receipts?

A. The mate's receipts, I think, were taken in duplicate. The original mate's receipt was sent from the Westwego office to the freight office (my office at the foot of Thalia street) and duplicates retained at Westwego. Having received the originals at my office in New Orleans they would be filed there, with the possible exception of the steamship agency of Miller, Milleta & Co. They, years ago, and possibly were doing it at that time, established a new rule that we would surrender mate's receipts to them before they would issue master's receipts, but they were about the only agency doing that at that time.

Q. When in point of process did you receive through them their bills of lading from the steamer?

A. Master's receipts we termed those—a sort of ocean bill of lading.

Q. You received ocean bills of lading?

A. Master's receipts are the technical terms. Those we would receive after the cotton was placed aboard the vessel, if it should go abroad. As a rule all cotton receipted for by the ship goes aboard the vessel that is loading at the time, but there are exceptions to that rule, but the steamships were obligated to give us the master's receipt as soon as the mate's receipt was signed. Only in connection, possibly, with the one firm of Miller, Milletta & Co. did we send to the steamship our copy of the mate's receipts and receive in exchange master's receipts. We did not receive what are called ocean bills of lading from Elder, Dempster & Company at any time that I recall. Ocean bills of lading—master's receipts, as they are
21 called, and which are recognized as such—it was not customary for railroads to receive. Those were usually given to the shipper in case the shipper preferred what is called an ocean bill of lading to a master's receipt. The mate's receipt was the prime evidence that the railway company had of any delivery on board a ship of any cotton. The railway company had nothing further than the master's receipt—that was secondary evidence—where the mate's receipts were not surrendered.

The period of time which would elapse between the receipt by the railway company of the transfer slips from the steamship company and the arrival of the steamer at the dock at Westwego would all depend. At times the transfer slips were returned to us before the steamer would arrive; at other times the steamer would be in the river at some city wharf, expecting to go to Westwego the next day, or several days after; at other times the slips were probably returned the same day the steamer went to Westwego. The object of the steamship company returning to us the transfer slips was to designate the quantity of cotton they might want aboard a steamer, and what particular cotton—at times. I have now described the course of business that was usually followed at Westwego during

the months of October and November, 1894, as to your specific questions.

After our receipt from the steamship company of these transfers slips with marks of lots of cotton upon them, if it should be necessary to get out the cotton mentioned in them, that would be attended to by some of the employees at Westwego, the railway employees at Westwego, as to locating the cotton and getting it out. It was not necessary to get it out at all times. It was on the wharf. It was all over the wharf. It was usually stored, and inside of the railway track toward the land. I don't know that I issued any specific orders to any one in respect to getting out that cotton. It was understood
22 that we would get out cotton when necessary to do it. By "getting out cotton" I mean trucking it out from where it was originally stored on the wharf, out, say in front, or, when enough in front, to enable the steamship people to get it out without having to go around other piles of the cotton. When that was done at all it was usually done after the receipt of these transfer slips from the steamship company.

Q. Was it usually done?

A. That would depend on the location of the cotton on the wharf. In some instances it was done and in some instances it was not done. I do not mean, necessarily, that before the receipt of the transfer slips from the steamship company, the cotton that was destined for a steamer was put between the sheds and the river, I simply mean that if cotton which Elder, Dempster & Company, for instance, sent a steamer there to get, if it was where they could get at that cotton, if there was no obstruction of any consequence between where this cotton was stored that they went there to get and the ship's side, that, in that case, we had nothing to do with getting it out; they took it from where it was located.

Q. We will follow a general lot of cotton through all its ramifications, please. The papers which you now produce are used as skeleton waybills, are they?

A. All skeletons, made from the original waybills, at Westwego. The object of making those is to enable the check clerks to have documents from which to check cotton out of the cars. The particulars are then entered in the cotton book. These skeleton waybills are then turned over to the check clerks for use in checking cotton from cars discharged at the time as they get ready to unload the cotton. After the cotton is checked out of the cars the check clerks sign them, sign their name, placing "O K" on each above their name, and show the post number near which the cotton is posted or placed on the wharf.

Defendant's counsel offers in evidence the waybills from Temple, Texas, to New Orleans, dated October 30, 1894, being five in number.

23 Admitted, marked Defendant's Exhibits 1 to 5, both inclusive, and made a part hereof (printed *post* at pp. 129 *et seq.*).

Defendant's counsel offers in evidence the following skeletons, covering the waybills heretofore admitted in evidence, Nos. 1707, 1706, 1705, 1704 and 1703.

Admitted, marked Defendant's Exhibits 6 to 10, both inclusive, and made a part hereof (printed *post* at pp. 131 *et seq.*).

Defendant's counsel offers in evidence the following transfer sheets Nos. 2761, 2762, 2763, 2764 and 2765.

Admitted, marked Defendant's Exhibits 11 to 15, both inclusive, and made a part hereof (printed *post* at pp. 136 *et seq.*).

Plaintiffs' counsel offers in evidence the contract, No. 69.

Admitted, marked Plaintiffs' Exhibit F, and made a part hereof (printed *post* at pp. 138 *et seq.*).

Defendant's counsel resumes the reading of the deposition of Mr. Miller, as follows:

Cross-examination by Mr. TAGGART:

Q. Mr. Miller, have you a record of the dates of the arrival of these various consignments of cotton at Westwego?

A. I have. I would get those by referring to the car record book—that is a book showing the arrival of cars at Westwego. When a train arrives at Westwego a record of the cars of which that train is composed is turned in by the conductor. These waybills show the contents of each of the cars in that train, and in that way we would understand that a particular car brought a particular lot of cotton. This book which I have, and which I call the car-record book, contains a record of a great many cars aside from those
24 containing these shipments. The only way in which I can ascertain as to the arrival of the cars containing this particular lot of cotton would be to take the waybills and take from them.

The method of ascertaining the date of unloading at Westwego, would be by taking the skeleton sheets. By taking these skeleton sheets we would be able to ascertain the dates of the unloading of any particular cars, in case the date would, in all instances, be shown. There may be some isolated cases where the dates are omitted from the skeleton sheets. Then to get the record of the unloading of these cars we would take the date on which the skeleton sheets were transmitted from the Westwego office to my office. They would be found in the Westwego letter book transmitting them.

Q. Now, Mr. Miller, after the delivery of these transfer sheets to the steamship agents were any of them in the habit of designating what particular lots of cotton they should take on particular steamers?

A. Yes, sir. That was done by returning the transfers to my office with a letter of transmittal showing the total number of bales covered by the transfers returned, instructing that the cotton covered by these transfers be delivered to a certain steamer. In some cases where there were only a few transfers the steamship agents at times would simply endorse on the face of the transfers instructions as to the delivery, returning the transfers.

Q. And what was the method practiced with reference to giving steamers cotton not named in the transfers returned to the office in case there was capacity in the vessel to receive it?

A. The practice was to give the steamships all the cotton they would receive and take on board, regardless of whether the cotton was covered by the regular transfer orders or not.

The contract with the steamship agents, referred to in the bill of lading in this suit, I have here—the number of that contract is 69.

25 Q. You were inquired of respecting Elder, Dempster & Company's wharf in the city of New Orleans. Was it the custom of the Texas and Pacific Railway Company to ever deliver cotton to Elder, Dempster & Company at that wharf?

A. At times.

Q. That is what kind of cotton or nature, or sort of shipments were delivered to Elder, Dempster & Company's wharf in New Orleans?

A. Practically the same class of cotton as that we were handling at Westwego; but it was not the custom to make deliveries at that wharf of Elder, Dempster & Company in the city at that time. At that time we were handling their business at Westwego. We had been handling it at Westwego probably for a month, or a month and a half, previous to the fire, as to that particular season of 1894 and 1895. It had been so handled the previous season at Westwego. There was no other recognized place of connection between Elder, Dempster & Company's line of steamships and the Texas and Pacific Railway Company than Westwego, at and prior to the time of the fire.

Plaintiffs' counsel reads from the deposition of Mr. MILLER, as follows:

Direct examination by Mr. CLEVELAND:

Westwego was not built at the time I became freight agent. It was not built under my supervision, but during the time I was in New Orleans as freight agent. I performed my duties of local freight agent principally at New Orleans. New Orleans was the central location.

The dock was about 800 feet long. I should say the sheds were probably—there were two sheds on the wharf, probably 300 feet or 250 to 300 feet would be the length of each shed. They consisted simply of posts and a roof, no sides to either one of them.

26 In our parlance we designated the shed down the river, downstream, at the end of the wharf, as No. 1. That was the one nearest the elevator, and the other as No. 2. There was probably ten feet of space between the upper end of No. 2 shed and the upper end of the wharf, and there was probably 100 feet between the lower end of shed No. 2 and the upper end of shed No. 1, about, say, 100, 110, or 115 feet. Between those sheds there was an open space which was not planked over. This whole structure, this wharf, was of wood—wooden spiles upon which beams or joists were laid and then a flooring of wooden planks upon which wooden posts were erected which held the wooden roof. This open space between the two sheds was probably fifty or sixty feet in width—by width I mean between

the two sheds—and it was entirely crosswise of the wharf, I don't know how long. It just about was the width of the shed. The sheds were probably 300 feet wide—250 to 300 feet. They were not exactly square, they were longer up and down the river than they were crosswise. There was probably fifty feet of wharf space from the end of No. 1 shed to the end of the wharf toward the elevator. It was probably eight or ten feet from the side of the shed or the eave line of the roof of the sheds, in the rear, to the edge of the wharf next to the tracks in the rear.

The waybills first came to Westwego and then were forwarded from Westwego to New Orleans. The bills of lading came by mail or express usually; didn't accompany our shipments of cotton at all. They came direct to the New Orleans office and never came to Westwego..

The book of first importance at Westwego I call the skeleton book; the skeletons are simply abstracts of the waybills. I call that a skeleton book. I had a cotton book, a car-record book—the record of the car reports—those we keep in a book; those are about the principal records that we have there. I don't remember of any other records that we have here; we did not keep the waybills
27 there; we did not keep the bills of lading there. That was about the principal document that we kept there; of course we kept stationery there. I don't know that that was all we kept. We had two or three clerks there. Only three books is all I recollect. I don't recall any other.

I have the particulars as to what steamers we delivered cotton to during the week prior to the fire.

Witness produces it.

Plaintiffs' counsel offers in evidence berthing reports for November 5th, 6th, 7th, 8th, 9th, 10th and 11th.

Admitted, marked Plaintiffs' Exhibits G, G 1, &c., to G 6, inclusive, and made a part hereof.

(Printed *post* at pages 122 *et seq.*)

This is what I term a berthing report; a report made at the Westwego office to my office, daily, of vessels at the wharves up there, what class of freight they are taking, &c. The others that I have date from November 5th, and cover each day up to, and including November 11th. These berthing reports cover the hours of 7, 12 and 6 on each of the days which they purport to give the particulars of. The first column indicates the grain wharf, then there are two columns headed "1" and "2," they indicate the two cotton wharves—cotton wharf No. 1 and cotton wharf No. 2. Cotton wharf No. 1 was the wharf downstream toward the elevator, opposite No. 1 wharf—No. 1 shed.

Q. There was no break in the line of the wharf, was there, along the river front, it was all one continuous wharf?

A. The grain wharf—what we termed the grain wharf—ran up and connected with the lower end of the cotton wharf. The cotton was all in one continuous wharf, but divided arbitrarily by us into numbers 1 and 2 in accordance with the sheds.

This report of November 5th shows that on November 5th there were loading at cotton wharf No. 1, the steamship Hajeen,
28 bound for Bremen, for account of the Elder, Dempster line, and at cotton wharf No. 2 the steamship Straits of Magellan. These figures, "total, 2994," concerning the Hajeen, mean that up to and including the 5th of November we delivered to the steamship Hajeen 2,994 bales of cotton, and 1,908 bales of cotton to the steamship Straits of Magellan. The report of the 6th shows the loading of them so far as the cotton wharf is concerned. The report of the 7th shows that the Hajeen finished loading at 11 a. m., and had taken up to date 4,729, and that the steamship Electrician, for Liverpool, on account of the Harrison Company, dropped down to No. 1 wharf at 12 noon. That report shows that the Electrician and Straits of Magellan were loading at No. 1 and No. 2 wharf in the latter part of the 7th of November. The report for the 8th of November shows that the Straits of Magellan left at 9 a. m. on the 8th of November having taken 2,997 bales, and that the Electrician was still loading on the 8th of November, and that the steamship Malabar came to No. 1 wharf for cotton-seed cake at 1 p. m. on the 8th of November. The report of the 9th of November shows that the Malabar dropped back to the elevator at 2 p. m., could not load, and that the Electrician was still loading, and left at 12.30 p. m. having taken then 2,413 bales. The report of the 10th of November shows the steamship Elberfeld arriving at No. 2 cotton dock and the Malabar loading at No. 1, the Elberfeld loading meal and cake—cotton-seed meal and cotton-seed cake. The report of November 11th shows the Malabar moved to the elevator for a tug to make water and the Elberfeld still loading cotton meal; that the Malabar returned at 6 p. m. for cotton and cake on account of Steinhardt & Company. I haven't the report of the 12th. I don't imagine it was made. I have no record of it. I judge on account of the fire that things got confused.

The waybill does not show when the cotton went forward
29 on the ship; the record that we would consult then would be the record of deliveries to that steamer.

Q. What record did you keep of that?

A. We obtained what is termed the mate's receipt, a receipt from the mate of the steamer for each particular lot of cotton.

Q. Show me a sample of what you call a transfer.

(Witness does so and says:)

A. I show you a paper which I call a transfer sheet; this is an original transfer sheet as I call it. That we sent to Elder, Dempster & Company. I haven't the date here on which we sent that, but the letter book will show. The letter book gives reference to the transfer-sheet numbers.

Q. You don't mean to say you sent that original sheet to Elder, Dempster & Company, did you?

A. Yes, sir; the original sheet.

Q. How did you get it back from them?

A. After the fire, in fact the night of the fire, we sent down to the

steamship offices to get what transfer sheets they held to be returned to us, and we obtained some that night from some of the offices, but I believe the office of Elder, Dempster & Company was closed when our man got down there and we either sent down a man the next day or we communicated with Elder, Dempster & Company and they sent them up to us.

Q. What would the railway company do, ordinarily, immediately after the return of the transfer slip by the steamship company to the railway company, concerning the cotton that was mentioned on the transfer slip?

A. We would make out an order on the Westwego office to deliver such cotton as the steamship agents ordered.

The documents which I showed you the other day, and which I call berthing reports, show that there was room for two vessels to load at the cotton dock—two vessels with key berths, what we term inside or key berths.

30 I have figured up how many bales of cotton were unloaded from cars at Westwego from the 1st to the 12th of November, 1894, and I have that here. I will give it to you as to dates, and state that I am now refreshing my recollection by referring to tissue copies of daily reports made to myself by the Westwego office. On November 1, 1894, we unloaded on the wharf 1,692 bales of cotton. The report which I now produce and which runs from November 1st to the 12th of November, inclusive, gives all the information which I received at that time on the subject.

(Daily reports afterwards offered in evidence, see *post* at pp. 140 *et seq.*)

Our daily report of the 12th of November, 1894, which you show me, shows that there were on that date on hand in cars at last report 145 cars carrying 5,245 bales; that there were received on November 12th, 65 cars with 2,760 bales in them; that there were on hand at the close of the day's business, apparently from that, 210 cars; and that there were none unloaded on the 12th; that there were on hand that night 206 cars with 8,000 bales in them; that there were on the deck that night 20,879 bales, and that there were none loaded on a steamship that day.

By the COURT: Have the documents, as yet, shown the day when this lot arrived?

Mr. TAGGART: Yes, the dates of arrival are shown by the skeletons. They arrived at Westwego on the 5th and 6th of November. The skeletons show it was all unloaded on the 6th of November.

The COURT: What post?

Mr. TAGGART: Post 1.

The COURT: That is not so material, what I wanted to know was whether there were any indications on the face of the paper that it was shifted afterwards from the post to which it was first put.

Mr. TAGGART: No, sir; post 1 and post 3.

31 The COURT: What do the documents show as to the first notification to the steamer as to this particular cotton?

Mr. CLEVELAND: On three or four of the skeletons there is no mark of any post.

Mr. TAGGART: "S. wharf" is the location of one; "South Margin" is the location of another, and "South Margin" is the location of another; the meaning of those phrases I will have to explain. There are two of them that have posts.

The COURT: There is no indication, however, that any shift was made after they were first placed?

Mr. TAGGART: No, sir.

The COURT: The next question is what, so far as the documents show, was the date at which the steamship company was notified that these bales were there?

Mr. TAGGART: There was no notification to the steamship company on these bales.

Mr. CLEVELAND: You put in transfers on the 11th and 12th of November, the day of the fire.

Mr. TAGGART: That does not throw any light on the question the judge has asked.

The COURT: The documents that are in now do not show a notification to the steamship company?

Mr. TAGGART: No, sir.

Plaintiffs' counsel resumes the reading of the deposition of Mr. Miller as follows:

That the total receipts "this season" were 64,316 bales, and the total delivered on steamships 34,764 bales.

Q. What does this mean at the end of these daily reports concerning insurance reports?

A. That has reference to the number of bales on hand consigned via each particular line. It is called an insurance report for the reason that we telegraphed our auditor in Dallas, Texas, each day, as to the number of bales of cotton on hand. I don't know for what purpose. I have never heard. Then we have an impression
32 copy of orders gotten out at the New Orleans office on the Westwego office ordering certain cotton delivered to steamships at Westwego from September 27, 1893, to January 25, 1895.

Q. This letter book, or letter-press impression book, contains orders from your New Orleans office to your Westwego office to deliver certain cotton to steamships, does it not?

A. Yes, sir.

Q. And the Westwego office was guided by the directions contained in these various letters, I presume?

A. Yes, sir.

Q. And guided by them alone?

A. Not necessarily; there may have been other instructions not embodied in those orders. I do not know of any other. It was the object of this book to keep a record of all orders that were sent out from our New Orleans office to our Westwego office directing shipments of cotton, so far as orders contained in that particular book are concerned. We intended to have a record of every order.

Cross-examination by Mr. TAGGART:

I recognize the letter of November 6th which you show me marked "Z 1005." It is a letter from Elder, Dempster & Company addressed to myself, dated November 6, 1894, returning us transfers, covering an order to deliver to the steamship Leyden, then due at Westwego, 4,721 bales of cotton, and ordering, furthermore, that 342 bales shut out of the steamship British Crown, be likewise delivered to the steamship Leyden, making a total of 5,063 bales. In addition to that, 200 bales they state in that letter were reported as being shut out of the steamship British Crown, and if that proved to be the case to deliver those 200 bales to the steamship Leyden.

Q. I notice this letter does not designate the numbers of
33 transfers. What was the method of business at your office upon receipt of communications of that sort?

A. I took the transfers received with the communications and compiled a written order on Westwego covering the same cotton as covered by these transfers. I have the document which was transferred on the 6th or thereabouts of November from transfers enclosed.

Plaintiffs' counsel offers in evidence the letter referred to, dated November 6, 1894, and the document transferred, and the same are admitted. The document transferred (which was marked "Z 1006") is marked Plaintiffs' Exhibit H, and made a part hereof (printed *post* at pp. 139 *et seq.*).

The letter dated November 6, 1894, which was marked "Z 1005," was read, and is as follows:

"Elder, Dempster & Co., steamship agents and brokers, Liverpool, Manchester, London, Hamburg and New Orleans.

"New Orleans, Nov. 6th, 1894, 189 Gravier street. C. G. Miller, Esq., T. & P. R.: Please have cotton as per enclosed transfers ready to deliver to S. S. Leyden, now due at Westwego, 4,721 bales. The following cotton shut out of the S. S. British Crown we would like delivered to Leyden, also

"Cont.	43	B.—Ldg.	38, G. L. O. W.....	1
"	51	"	3, P. M. D.....	1
"	"	"	2, O. D. H.....	25
"	"	"	7, D. Y. E. W.....	1
"	"	"	1, L. N. G.....	7
"	"	"	4, L. G. R.....	20
Cont.	51	B.—Ldg.	3, O. A. W.....	20
"	54	"	37, B. L. U.....	17
"	"	"	27, L. K. D.....	200
"	200	"	8, E. A. C. H.....	50
				342 bales.

"Total to Leyden 5,063 bales.

34 "The following cotton is reported to have been loaded on the British Crown. If the cotton did not go on this vessel please deliver to steamship Leyden:

Cont. 70 B.—Ldg.	41,	T. C. A.	50
" 54 "	54,	D. I. F.	50
" 63 "	34,	C. Y. Z.	100
			200 bales.

" Yours truly, *p. pro* ELDER, DEMPSTER & CO.,
" M. R. WARRINER."

Redirect examination by Mr. CLEVELAND:

The papers marked " Z 1006 " are not the identical papers which I forwarded to Messrs. Elder, Dempster & Company and received back from them; that is an order from my office on the Westwego office based on transfers that we received back from Elder, Dempster & Company. Elder, Dempster & Company never had " Z 1006 " themselves.

Defendant's counsel reads from the deposition of Mr. MILLER as follows:

Cross-examination by Mr. TAGGART:

After the delivery of these transfer sheets to the steamship agents they were in the habit of designating what particular lots of cotton they should take on particular steamers. That was done by returning the transfers to my office, with a letter of transmittal showing the total number of bales covered by the transfers returned, instructing that the cotton covered by these transfers be delivered to a certain steamer. In some cases where there were only a few transfers, the steamship agent, at times, would simply endorse on the face of the transfers instructions as to the delivery, returning the transfers.

35 The letter of October 18th, which you show me (and which is marked " Z 1008 "), is a letter from Elder, Dempster & Company, addressed to Mr. Wilkinson, our chief clerk at Westwego, informing him, in effect, that the steamship Merrimac would drop down from Southport at noon on the 19th.

Q. I just asked you whose letter it was.

A. A letter from Elder, Dempster & Company.

Q. Can you tell me why that letter was addressed to Mr. Wilkinson?

A. The matter of ordering cotton to that particular steamship was not handled through my office. The custom was that the Westwego office would not necessarily confine the delivery of cotton to steamships to orders sent from my office in the form that has just been exhibited in connection with the steamship Leyden.

Direct examination by Mr. CLEVELAND:

Q. Did it sometimes happen that a steamship when it did arrive took cotton other than that which was mentioned on the transfer slip?

A. Yes, sir. That has happened.

Q. And did not take all the cotton which was mentioned on the transfer slip?

A. We possibly had some cases of that kind.

Plaintiffs' counsel reads from the deposition of Mr. MILLER as follows:

Redirect examination by Mr. CLEVELAND:

Q. Will you produce, please, for me, any other written order by the Messrs. Elder, Dempster Company, or any agent of theirs, to Mr. Wilkinson or to any other person than yourself, relating to the loading of cotton on any vessel during October and November, 1894, than the one marked "Z 1008," if you have such?

A. I have no such here. I don't know whether I have any more or not. I don't recollect any more than this.

36 Defendant's counsel reads from the deposition of Mr. MILLER, as follows:

Redirect examination by Mr. CLEVELAND:

Q. What other variations from the custom which you described on your direct examination do you know of, than the exception which seems to be included in "Z 1008"?

A. Well, the officers of the steamships at Westwego would, at times, inform Mr. Wilkinson or our Westwego employees, that they would take a certain number of bales of cotton—Elder, Dempster & Company might afford the same information to Westwego or my office might afford the same information to Westwego—over and above the amount specifically mentioned in the written order from Elder, Dempster & Company.

Q. That additional amount was to replace an amount mentioned on the transfers which they may receive or that was not convenient, was that not right?

A. No, sir; not exactly.

Q. Do you know of any other reason for taking such an additional amount not mentioned on the transfers than simply because it was not handy to get out?

A. At the time that Elder, Dempster & Company would order a steamer to Westwego we might have, say (for which Elder, Dempster & Company held transfers) 2,000 bales, or the steamer might have room for, say 3,000 or 4,000 bales, then the Westwego office would be informed, from one of several sources, or probably from several sources, that they might deliver to that steamer up to 3,000 or 4,000 bales, in case they should have that amount there, or in case it would arrive during the time the steamer was loading, that occurred at times. I don't recall any specific instance where the subsequent arrivals made it necessary to observe that practice. I recall
37 in a general way that that practice was observed and we have had such instances. Those instances were not contrary to our usual practice; that was the practice under those circumstances.

Q. The usual practice, as I understood you to say in your direct examination, was to transfer to the ship such cotton as you had orders for to deliver to such steamships, from Elder, Dempster & Company, is that the fact?

A. That's the fact. Yes, sir.

Plaintiffs' counsel reads from the deposition of Mr. MILLER as follows:

Redirect examination by Mr. CLEVELAND:

Q. Now, in what instances within your knowledge were there variations from that custom?

A. In the instance of the steamship British Crown. Some cotton was delivered to the steamship British Crown that was not ordered by Elder, Dempster & Company; some cotton that was ordered was not delivered; that is shut out, as I call it. The explanation being, as I recollect it, that Westwego was given to understand, or was under the impression, that the British Crown would at that time take more cotton aboard than was called for on the order from Elder, Dempster & Company. The arrangement was not carried out; that is, the steamer filled up before all the cotton was placed aboard, probably couldn't carry as much as she figured on carrying.

Mr. CLEVELAND: I wish to call attention to certain pages in this impression book, of these transfers, and simply state what they show. The earliest one is November 1, 1894. The next four pages are the letter-press copies of Exhibit Z 1006, being dated November 6, 1894. The next page in the book is dated November 7, 1894. The next page is dated November 19, 1894.

Defendant's counsel objects to this testimony as immaterial. Objection overruled. Exception.

38 CHARLES K. LINCOLN, having been duly sworn, being examined by Mr. Taggart as a witness on behalf of the defendant, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am a stevedore. I have been a stevedore in New Orleans on my own account about twenty years. I have worked for myself and others in that line thirty-three years. I have been in New Orleans all that time, except going away from here in the summer time. I live in New Orleans altogether.

Q. Describe, if you will, Mr. Lincoln, the business, that is the general business of a stevedore as to the handling of ships.

A. Well, I take these ships by contract from the charterer, captain or anybody else, to unload and discharge them. I take them by the ton and bale also, take contracts that way. As a general thing it is the ship's agent or the charterer who hires the stevedore. I have loaded ships at all the places at which ships load in the port of New Orleans. I have had occasion to go to Westwego every season. I

have worked there more or less. I have been going to Westwego to load ships ever since the wharf was built. I think that I had occasion to go there or work there before the wharves were built. I think I unloaded railroad iron before the wharves were built, but I am not sure.

The stevedore first takes charge of a ship, after he has contracted with the steamship agent or with the charterer for the loading or unloading of that vessel, immediately after her arrival at the wharf. That is, the wharf where she is to load or unload. Wherever the agents designate the wharf the stevedore takes charge when she arrives there. When we are loading there the chief officer of the ship receives the freight that is destined to be put on board
39 by the stevedore, he receipts for the cargo. Then the stevedore takes charge of the freight as soon as it is received by the ship. As soon as the cargo is received by the chief officer, the stevedore takes charge of it and places it aboard the ship. The stevedore knows from the chief officer which freight is for each ship.

Q. Where, Mr. Lincoln, in reference to the ship, is the freight delivered that is destined to be put on that ship?

A. Supposed to be abreast of the ship. By abreast of the ship, I mean anywhere within her length; we consider that, taking her from a standard of the wharves of the city—we consider that freight should be placed within 75 feet of the ship and within her length. The technical term that they use in describing that place where the freight must be put is "within reach of the ship's tackle," and it has been considered that 75 feet is within reach of the ship's tackle. That is the custom here; always has been the custom here. That has always been the custom since I have been a stevedore. At different terminals, at Southport and at Westwego and Chalmette, the cargo is placed within reach of the ship's tackles by the railroad.

Q. And at other wharves?

A. Well, there it is received generally by the agents of the ship at the city front.

Q. And who, Mr. Lincoln, places the freight within reach of the ship's tackle?

A. Well, at times it is the ship or the stevedore, or perhaps the railroad itself puts it there.

Q. You don't quite get my question; I mean who makes the delivery—who brings the goods on the wharves of the city front to the place within reach of the ship's tackle?

A. If it is city cotton, stuff shipped from the city, drays haul it, otherwise it is put there by the railroad. The shipper, I presume, pays those drays.

40 Cross-examination by Mr. TAGGART:

Q. Mr. Lincoln, you say the freight is supposed to be abreast of the ship, that is, you mean alongside of the ship, opposite the ship?

A. Yes, sir; within her length.

Q. And it differs somewhat at different wharves, don't it, as to whether it is always within the exact limits?

A. It is possible, frequently it is not within the limits, not within her length. When it is 75 feet we use trucks altogether. It frequently happens at such places as Southport and Westwego, that, where it is abreast but more than 75 feet away, the stevedore trucks it beyond the 75 feet, but as a general thing it must pay extra for that. He is to take it, no matter where it is. It was the habit there at Westwego to take the cotton or other cargo where it happened to be pointed out.

Q. And it would be very difficult, would it not, in places like Westwego or Southport, where the wharves are very wide, to make an exact limit of 75 feet?

A. Couldn't get all the cargo there to keep the stevedore employed all the time, and his men going.

Q. So that with gangways, as they were at Westwego, you would truck from the point where the cargo happened to be, if it was abreast of the ship?

A. Yes, sir; wherever it was. If it was outside the limit, why, the stevedore had to pay extra for it, a sort of sliding scale of compensation.

Q. You say that after Westwego was built, you were accustomed to go there for freight?

A. I have been there, more or less, ever since the wharf was built, every year; that was on behalf of the different steamship lines that come to the city for freight of the kind that was handled at Westwego; export goods were handled there altogether. I loaded all kinds of freight, all export goods. I have loaded pig iron, cotton, oil cake, meal, and all such stuff as that at Westwego.

41 Plaintiffs' counsel reads from the deposition of Mr. LINCOLN:

Cross-examination by Mr. TAGGART:

A. I have had to do with unloading at Westwego, but it is very seldom we get a ship to unload there. I have had it to do, I think; once or twice I put out a little stuff over there.

Mr. CLEVELAND: I think I should have offered in evidence these pages of the impression *hook*; it will not appear what the pages show. Mr. Taggart and I agree that the pages follow in the dates stated; the first is November 1st, and then the impression of Exhibit Z 1006 of November 6th; then a page of November 7th, then a page of November 19th.

The pages of the impression book are admitted, marked Plaintiffs' Exhibit K, and made a part hereof (not printed, see stipulation *post*, pp. — *et seq.*).

ALFRED LE BLANC, having been duly sworn, being examined by Mr. Taggart as a witness on behalf of the defendant, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am forty-five years of age, reside in New Orleans, and am the agent of the Harrison line of steamers. I have been the agent for that line nineteen years. I was in that line of business in 1893 and 1894. I have not represented any other lines in New Orleans than the Harrison line. We have two special wharves here in New Orleans, one is at Jackson square and the other at Picayune tier. We had those wharves in 1894. We have no other wharves except those here
42 in New Orleans. The Harrison line is engaged in carrying business between here and Liverpool, that is, both to and from New Orleans. It carries anything that comes along. The steamers of our line carry cotton, and have done so always. When that cotton leaves New Orleans on our line it is consigned to Liverpool. Our line has carried cotton from this port continually since I have been the agent here. In 1893 and 1894 the cotton that our line carried was delivered to our ships everywhere. Cotton was delivered to our ships at other places than at our wharves. In 1894 we carried considerable cotton from the Westwego wharf. That cotton was delivered at Westwego by the Texas and Pacific railroad. I think all the cotton delivered to us that year, via the Texas and Pacific Railway Company, was delivered at Westwego.

Q. In 1894, Mr. Le Blanc, please state whether or not you had any arrangement with the Texas and Pacific Railway Company relative to receiving cotton from that road.

A. I don't quite understand your question. We used to make arrangements for cotton, and when it came in we went there for it, but we had no other arrangements. Just like anybody else. We went to Westwego for it and everybody did. There was no special arrangement.

Q. When you received cotton at wharves other than your own, and at docks other than your own, how was it received by your vessels?

A. It was put on the wharf and when the ship went there an officer counted it and receipted for it.

Cross-examination by Mr. TAGGART:

I had been the agent for the Harrison line in New Orleans for a number of years before 1894. When I said that our ships received cotton everywhere, before 1894 and 1893, I meant that they went to various points to receive cotton. I should think the bulk
43 of the cotton carried by the Harrison line was received at other points than our own wharf. That custom was universal with steamships landing here in New Orleans, that is at the terminals of railways the steamship lines were all accustomed to receive cotton which was shipped over the various rail lines which was to

go from the rail lines to the steamship lines. It was also for a long time before that a custom for the steamship lines and the rail lines to unite in making what we call a through rate, which was a combining of the local rates of the two; that is, the railway company at the point of shipment would make a through rate to the shipper in Liverpool, we will say, and that would be based upon a contract with the steamship company by which the steamship company would accept a certain proportion of that rate from the railway as its share of the carriage. Those are the kind of contracts or arrangements that I speak of that were in force in 1894 between our line and the Texas and Pacific Railway Company, and it was in accordance with this custom or an arrangement of that sort that the reception of the cotton by the steamship lines was the terminus of the railway; and it was so in the case of the Texas and Pacific, and had been so for several years before 1894.

Q. When you speak of a minimum amount of 1,000 bales of cotton, do you mean that would be the minimum amount you would enter into under one of these contracts?

A. No, sir; we would not go to Westwego unless there was at least that amount there.

Q. But you would go there where you had made one of these contracts, and there was a balance of a shipment which was included in that contract which had not yet been taken?

A. We would have to do it.

Q. That would be a part of your contract, would it not?

A. Yes, sir.

Plaintiffs' counsel reads from the deposition of Mr. LE BLANC as follows:

44 Direct examination by Mr. CLEVELAND:

I do not remember when the Westwego wharves that were burnt in 1894 were built.

Q. Before the construction of the wharves at Westwego, did you carry any cotton for the Texas and Pacific railway?

Objected to as immaterial. Objection overruled. Exception by defendant.

A. Yes; delivery was made at that time, sometimes at their own wharf on the New Orleans side and sometimes at ours. It was all delivered from the New Orleans side of the river. I have been to Westwego. I was never at Westwego before the Texas and Pacific Railway Company built there.

The wharves at Westwego were in charge of the Texas and Pacific railroad. Their permission had to be obtained before the vessels went there. I never sent a vessel to Westwego to load a cargo without having previously made or obtained some arrangement with the railroad company.

Q. Would you go to Westwego to receive any amount of cotton from the Texas and Pacific Railway Company?

A. Well, we wouldn't go there for less than 1,000 or 1,500 bales,

but there was nothing definite, just a sort of an understanding; that understanding was with the railroad. There was no written contract. In 1894 we had a contract with the Texas and Pacific Railway Company to transport cotton; different contracts. We made engagements from day to day. We had no general contract. These contracts that I speak of were in writing. The minimum amount of cotton for which our vessels would go to Westwego at that time, was 1,000 to 1,500 bales. We would not agree in advance that any of our steamers would go there to take any amount of cotton less than 1,000 bales. According to the custom in New Orleans at that
45 time if I had had an arrangement to take, say less than 500 bales of cotton coming from the Texas and Pacific Railway Company, that delivery would probably have been made at our wharf, on the New Orleans side of the river. Cotton delivered by the Texas and Pacific Railway Company to our line, in New Orleans on our wharves, was delivered in drays; brought to our docks and landings on drays at the expense of the railroad. I never paid for any such transportation. The drays put it on the wharf and we received it. The dray brought it down to the wharf, the drayman unloaded it, and we were on the wharf and signed a receipt for it. When we received cotton at wharves other than our own, and at docks other than our own, it was put on the wharf, and when the ship went there an officer counted it and receipted for it. That cotton was required to be placed within her reach before it would be receipted for by the ship's officers; by that I mean so we can get to it; within reach of the ship's tackle is the common expression.

Q. Will you describe, if you please, exactly what is meant by within reach of the ship's tackle?

Objected to as immaterial. Objection overruled. Exception by defendant.

A. Literally that means where the ship's ropes can get on to it so that the ship's winches can pull it. If cotton was tendered a ship of our line not at our dock, or not at our wharves, and the cotton was not within reach of the ship's tackle, I do not think that cotton would be received by the ship's officers, unless there were some arrangement made by the railroad for trucking. We might in exceptional cases, accept it there, but I don't know of any.

Q. Would such truckage, without special arrangement, be paid for by you or by those who delivered it?

Objected to as immaterial. Objection overruled. Exception by defendant.

A. By those who delivered it.

46 Redirect examination by Mr. CLEVELAND:

Q. When cotton was delivered beyond the reach of the ship's tackle, Mr. Le Blanc, do you know who would pay for the additional truckage to a point within reach of the ship's tackle?

A. Well, I don't think it was ever delivered beyond the reach of

the ship's tackle. We employed men at so much a day to load the cotton and to load it from within reach of the ship's tackle. It has to be brought out either by the drays or trucks or the railroad trucks and when it is brought there the ship receives it. She doesn not receive it way off at the end of the wharf; does not sign for it until it gets down to her, brought there either by the railroad company or the longshoremen. That is an arrangement between the stevedore and the railroad men, the getting of it down to the proper place, but the ship does not receive it until it is alongside the tackle.

Defendant's counsel reads from the deposition of Mr. LE BLANC as follows:

Recross-examination by Mr. TAGGART:

The longshoremen are paid by the middleman. We have a contract with a man called a stevedore who employs the longshoremen. I do not know as a matter of actual fact how far these longshoremen would truck the cotton. It is not my business. That is a matter between the stevedore and the railroad. The stevedore is very likely to make the railroad truck it, but what actually did occur at Westwego in that respect I do not know. I do not suppose I was at Westwego in 1894 more than two or three times before the fire. I think I was there about a week before the fire. I did not observe particularly this matter of loading the ship or the trucking of the cotton, or anything of that sort, that did not concern me.

47 Cross-examination by Mr. TAGGART:

Q. So that whatever cotton was at Westwego which you had arranged for under one of these, what I would call through shipments, you would call for, as a part of your arrangement with the railroad, wouldn't you, under the written contract?

A. Each contract stood by itself.

Q. Exactly. And suppose you had made a contract for 10,000 bales at a rate of $1.49, and you had carried 9,500 of those bales in previous shipments you would not wait in order to make a new contract in case the remaining 500 bales were there ready for shipment, and you were advised of it, would you, before sending for it?

A. I think we might; I do not know.

Q. You think you would?

A. I think so.

Q. Suppose that was the last of the season, would you let it remain there, or would you expect the railroad to bring it to your wharf?

A. I think the railroad would have to bring it to our wharf.

Q. Suppose the remaining portion had been delivered at Westwego, did you ever know of a case where you compelled them to bring that to your wharf?

A. No, sir; I do not know of any case. I don't know what I would do under that arrangement.

It was the understanding that in these written contracts for through rates Westwego was the place of reception by the steamship company of the cotton. I think that had been so for some years prior to 1894. When I speak of cotton being placed within reach of the ship's tackle, I mean by that the ropes on the ship.

Q. Was it within reach of the ship, and was it the universal custom only to handle cotton which the ropes of the ship would reach, and that is where it was located on the wharf?

48 A. Ought to have been—I cannot say that it was. I do not know about the actual fact. I was not out there often. As to the actual handling on the wharf I do not know whether that practice was observed as a fact. Cotton was often trucked on the wharf. I was not there all the time, so I cannot tell you what was done; but it is always understood that the railroad delivers the cotton within reach of the ship, and if not, it has to be trucked to the ship's side. It is most always trucked from the point where the railroad company delivered it.

Q. Is it not a fact that in the handling of cotton generally aboard ship the longshoremen truck from the point where the cotton happens to be, close up to the ship's side, before the ship's tackle is actually fastened to it—don't you know that?

A. You mean to say the point where the cotton happens to be, if this happens to be within reach of the ship's tackle?

Q. Well, but it is trucked from wherever it is?

A. Yes, to the ship's side. When it is on a truck the additional few feet would not make much difference.

These wharves from which the cotton is handled are pretty extensive affairs. This wharf at Westwego is not the only wharf of the kind where similar shipments are made. There were not many others; there were only two others in 1894. They were at Southport and Gretna. Gretna is opposite New Orleans on the west bank of the river; the same side as Westwego; a little further down nearer the city. Southport is higher up and on the east side, the same side as the city of New Orleans. I do not remember any shipments of the character I have described—through shipments—of cotton in 1894, where the cotton was delivered to our dock. Whatever shipments of cotton we made from our two wharves in New Orleans were not exceptional shipments, they were smaller amounts from smaller roads, and for "spot" shippers and for individual shippers.

49 MATTHEW WARRINER, having been duly sworn, being examined by Mr. Taggart as a witness on behalf of the defendant, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I represent the Elder-Dempster Steamship Company—I am a steamship agent. I have been representing the Elder-Dempster Steamship Company at New Orleans since 1892.

Q. Where in 1892 was the dock of the Elder-Dempster Steamship Company in New Orleans?

A. We were allotted a wharf on Jackson street and retained that wharf during the season of 1892–'93, and 1894–'95, up to the present time. We have loaded vessels at other docks in New Orleans, but we had no other leased or special dock. This is a grant from the city; that is, a special privilege grant; it is not our dock.

During the season of 1893 and 1894, the season before the fire at Westwego, I think we received cotton from the Texas and Pacific Railway Company. I could not tell you how much, only very approximately, but it would run into the thousands, I should think. During the season of 1894 and 1895, we received from the Texas and Pacific Railway Company a considerable quantity. Cotton was delivered to the Elder-Dempster Company's line at New Orleans in the season of 1893–'94 by dray, and during 1894–'95 by drays and barges. During the season of 1894–'95 we sent some of our steamships to Westwego to load.

Q. Will you please to explain to me the custon that existed in the season of 1894–'95, that is, in October and November, 1894, in relation to the loading of cotton at Westwego?

A. We just sent our ships there to get whatever was ready for delivery and sign for it.

Q. What was the first step in the process?

50 A. Oh, we would try and find out how much there was there for us, that they were ready to deliver.

Q. Did you receive written notifications on the subject?

A. We received from time to time what they called transfer slips, which we took to be notifications of the arrival of cotton and readiness for delivery.

The paper which you now show me, is a letter-press copy of a letter dated New Orleans, November 2d, and addressed by the Texas and Pacific Railway Company to us. I recollect receiving letters of that character from the Texas and Pacific Railway Company constantly.

The paper which you now show me, marked "Z 1005" is our letter to the Texas and Pacific dated November 6th, produced by Mr. Miller, ordering cotton to the Leyden. I say in that letter, "Please have cotton as per enclosed transfers ready to deliver," &c.

The paper which you now show me and which is marked "Z 1006," is not the class of tranfers which we from time to time returned to the Texas and Pacific Railway Company; that is not the general form of transfer we returned. That is not the general form

referred to here. The general form is on a yellow slip, a long yellow slip, such as the paper you now show me.

Q. Now you were about to say something concerning your custom in relation to these transfers?

A. The custom was to return these to the railroad with the order to deliver to a specific steamship either at Westwego or about due at Westwego.

Q. Do you recollect ever seeing the paper which I show you which is marked "Z 1006"?

A. Not that particular paper; no.

Q. Or papers like that?

A. I remember a paper something like that in special instances where the steamers were due for large quantities of cotton,
51 and special settlements were made in the communications between the two offices. Special communications were made from time to time to make the records clearer. Having received these transfers slips from the railway company, we returned them to the railway company as soon as we were ready to take delivery of the cotton. The custom that existed as to the actual delivery of the cotton to the ship was the same all over the port, that is, the receiving officer of the ship counts the cotton and signs a receipt for it; the same with the Illinois Central depot; it is the same with the Southern Pacific and it is the same with all the roads.

Q. Then what is the next step after the officer of the ship has signed a receipt for it?

A. He keeps its counterpart and sends that down to our office and we sign the mate's receipt for the master, and deliver that master's receipt to the railroad.

Q. What was done with the mate's receipts for the cotton after that?

A. Sometimes the ship takes them away and sometimes they do not. Sometimes they take them away for their own purposes on the other side, in case there should be any dispute.

Q. You sent a letter of which this is a copy to Mr. Miiler?

A. Yes, sir.

The witness reads from the letter as follows:

"NOVEMBER 1ST, 1894.

"C. G. Miller, Esq.:

"T. & P. R'y S. S. British Crown left Westwego this morning after having taken 6,151 bales of cotton. We find on comparing mate's receipts with cotton ordered that the deliveries to this ship have been of an unsatisfactory character. For instance, we discovered that some 500 to 600 bales were delivered to the ship, although not ordered by us. We have not signed transfers for this cotton. On the other hand we find that bills of lading for about 600
52 bales, the transfers of which we sent you while the ship was loading, have been split and the cotton confused in the most extraordinary manner, to our great inconvenience and possible loss. Of course, we know that occasional splits sometimes are unavoidable in the height of the season, but we cannot find any excuse for such

confusion as the deliveries to the British Crown show to exist, and shall be glad if you will make a special effort to straighten this matter out as soon as possible. The splitting of bills of lading is a cause of great complaint of consignees on the other side and injures us very considerably. We, therefore, suggest before any other cotton is loaded some better system of delivery be perfected by you. Following the S. S. British Crown we propose to load the S. S. Leyden and the steamer Imaum at Westwego, the former due on the 5th and the latter about the 9th, so that there will be plenty of time for Westwego to prepare with a view to avoiding repetitions of such disorderly deliveries as were made to the S. S. British Crown.

"Yours truly,

"(S'g'd) ELDER, DEMPSTER & COMPANY."

The letter of November 6th refers to cotton shut out of the British Crown. By the expression "shut out of the British Crown" I mean ordered to the British Crown, but not delivered to the British Crown.

Q. A letter has been produced, Mr. Warriner, dated October 18, 1894, from yourself to Mr. Wilkinson, marked "Z 1008," will you be good enough to read it?

(Witness reads as requested the letter referred to.)

Q. Mr. Miller has testified, as I understand him, that there was a practice of loading cotton on your ships at Westwego for which he had received no regular transfers from your office; do you know of such a practice?

A. The practice has been more general since the fire than before. It was not the practice before, according to my recollection.

53 We are prepared to take any cotton at any time that we have room for, receive it when it is delivered to the ship, and sign for it in the same way. On November 12, 1894, I think we had cleared every transfer which had been sent to us by the Texas & Pacific Railway Company out of the office and sent them back to the T. and P. railroad. We had a good many ships at about that time—two or three of them, certainly—and were anxious to get ready for them. I recollect that about November 12, 1894, the S. S. Leyden went up to Westwego. She had not begun loading.

Q. Do you know what was the reason?

A. I don't know exactly, now, what was the reason. She was very late—she should have been in four or five days before that. She made a very long passage.

Plaintiffs' counsel reads from the deposition of Mr. WARRINER as follows:

Direct examination by Mr. CLEVELAND:

Q. Then on November 6th, after the delivery to the British Crown, were you still uncertain as to what cotton had actually been received on her?

Objected to as immaterial. Objection overruled. Exception by defendant.

A. Yes, there was a little anxiety about the deliveries to the British Crown.

No claim at any time prior to November 13, 1894, was ever made to the Elder, Dempster and Company Steamship line, as far as I know, that it had taken delivery of cotton for which master's receipts had not been signed.

54 ALGERNON L. WILKINSON, sworn and examined as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. TAGGART:

I am in the railroad business. I have been in the railroad service since 1872. I was in the service of the Texas and Pacific Railway Company in November, 1894. I had been in its service at that time since January of the same year at Westwego. I went there in January as clerk, assistant clerk, until I got the run of the work, and was put in charge of the wharves as chief clerk of the wharves about a month following. There were two wharves or piers there, known as No. 1 and No. 2, sheds or wharves, where we received different classes of freight. The combined length of the two wharves was a fraction over 800 feet. Each shed would hold a ship, an ordinary ship that came there. Sometimes we could double them, put one outside of the other and work four; working one across the other, if they were such ships as would fit to work that way.

Those sheds were about 240 feet wide; I mean the wharf; there were sheds on this wharf. The larger part of each of them was covered. There was a separation between these two wharves or loading places; there was a fire-hole fifty feet in width that separated them on the wharves' margin, so that we could work around from one to the other on each side. In the rear of the wharves, that is back from the river, there were two tracks parallel with the wharf its entire length, about four feet eight inches lower than the level of the wharf, to make the car door fit right flush with the wharf in discharging freight. If a car was brought there it was right level with the wharf, we would drop a gang plank. Of course they varied a little in the height of them.

Q. I show you a tracing and ask you if it is a substantially accurate representation of the wharves which you have described
55 with the tracks in the rear and the track on the wharf, as it existed prior to the fire of November, 1894 (showing witness a map).

A. Yes, sir; as near as I can say it is substantially accurate. The place marked up in the corner "office" was where the clerical work was all transacted and records kept. The rectangular places marked by black lines represent the upright posts that held the shed over the wharf. Here was an open space and here was the fire-hole fifty feet in width.

Defendant's counsel offers in evidence the tracing referred to.

By Mr. CLEVELAND:

I had no part in preparing this. I could not say that I ever saw it before I go on the stand yesterday. I do not know whether it is drawn to a scale.

Q. Do you know whether there are any dimensions marked on this?

A. They are printed on there.

The map is marked for identification Exhibit 16.

By Mr. TAGGART:

Besides this wharf that I speak of at Westwego in November, 1894, there was an elevator there, a conveyor. The following business was carried on at this wharf during the time I was there: export cotton, grain, cotton-seed products, such as cake, meal, cotton-seed oil, staves, walnut logs, anything of that class we were handling across the wharves. The class of cotton that was handled there was export cotton for foreign ports. I don't know whether the Texas and Pacific Railway Company, in handling export cotton in connection with steamship companies, had any other place of transshipment or delivery to steamship lines than Westwego, during
56 the time I was there. I don't think they had, unless they drayed from local depots. I know that cotton right along down there was drayed, and they had no terminal. There was no cotton delivered at Gouldsboro.

I had general charge of the dock and all the operations there during the time I was superintendent and know what the methods of doing business were during that time.

Q. Will you describe the general method of doing business there in the matter of handling cotton?

By the COURT: Give us the history of a bale of cotton from the time it comes in sight of the dock until it disappears on the steamer.

A. On the arrival of a car at Westwego it was accompanied by a waybill; a waybill say from Paris, Texas, to Westwego; car 4800; waybill 500; date October 30; John Smith, shipper; name of consignee; number of bales signed for on bill of lading, date of bill of lading; number of bill of lading; number of bales on this waybill which was in that car; marks; weight; rate, showing the division, freight and charges, whatever it might be. When the car reached there the waybill was turned over to a clerk known as a yard clerk, brought to the office and put in the yard records, giving the train that brought it there, the date, car number, initial and seal. The waybill then passed into the office and a skeleton was then made from that waybill, dated on the day of the arrival of the car at Westwego. After the skeleton was made the bill itself went on to the New Orleans office and the skeleton was put on a clip, filed, to be held until the car should come to the wharf to be unloaded. When a certain car was ordered in, the clerk in charge of that outside—or myself in case I should want it—would take the bill and give it to what is known as a check clerk. He would take the skeleton and verify the contents of that car, called for by

the skeleton, and deliver it to its location on the wharf
Those locations were numbered through so we would
57 know where to find the cotton when it was wanted. The skeleton was checked O K and was brought to the office and proper record made, and an impression copy made. They were made in copying ink but not copied until the car was discharged. It was posted, with the record of it, on the cotton book, then it was forwarded to the New Orleans office after we had got a complete record, Defendant's Exhibit 1 is the form of waybill I describe as accompanying the cotton. This is a "Katy" bill, that is the Missouri, Kansas and Texas—M., K. & T. "Katy" *is* known as Defendant's Exhibit No. 6 is the skeleton form in question. It is part of the cotton.

Q. What information with respect to the dates of arrival at Westwego, the date of unloading and the location on the wharf does this skeleton furnish?

A. As shown on the skeleton 40 bales of cotton Ex. T. & P. car 1806, covered by bill of lading F 43, from Temple. It shows that the car arrived at Westwego on November 6th. It was discharged November 7th. The cotton was located at post 1. Post 1 was the first section on the east end of the wharf. Part of the office was post 1, and running parallel with the office in the first section.

I will go through these skeletons and state the date of arrival and unloading.

Exhibit 7.—Arrived at Westwego November 6th; 40 bales of cotton Ex. T. & P. car 6207; Temple waybill F 43; unloaded November 7th; location, south margin or south wharf—it is marked here "margin"—by Check Clerk Coffey. "South margin" or "south wharf" was a space of seventy feet on the extreme eastern end of the wharf next to the office.

Exhibit No. 8.—Arrived November 6th; 20 bales marked S. I. 4 X; 20 bales marked P. O. C. J.; Ex. T. & P. car 6358; bill of lading F 43; Temple; unloaded November 7th; location south
58 margin; checked O K Clerk Le Condue. This south margin was the same a*t* I have already described.

Exhibit 9.—Arrived November 6th; Ex. T. & P.; car 4332; Temple bill of lading F 43; 40 bales of cotton marked P. O. C. J.; unloaded November 7th, 1894; south margin; O K. Le Condue; that is the same one that discharged the previous one, Exhibit 8.

Exhibit 10.—Arrived November 6th; Ex. T. & P. car 6675; Temple bill of lading, F 43; 40 bales of cotton marked P. O. C. J.

By the COURT:

Q. Unloaded when?
A. That is left blank.
Q. Location?
A. The location is here, post 3. Marked O K. Matthews.

By Mr. TAGGART:

I don't see the date of unloading.

Q. When cotton was thus unloaded where was it placed upon the wharf, what rule was observed with reference to placing it, I mean?

A. As far as possible we tried to divide the wharves up for different foreign ports, for instance we kept the Bremen cotton in number 1 shed, most all of it, the bulk of the Liverpool cotton in number 2. The Havre and other cotton would be in 1 and 2, but all that we could, we always kept entirely separate; of course if there was a mixed car came in, sometimes a bale would be mixed in one of the other sheds, or a few bales, but ordinarily we kept them together. The wharf stood north and south, parallel with the river; No. 1 shed was the south shed and No. 2 the north shed.

Q. What rule was observed, apart from separating it into Liverpool and Bremen cotton as you have described, with reference to putting it in the particular shed? Take this cotton, which was Bremen cotton, where was it placed?

59 A. In drilling the car in we have them drilled so that they would hit the shed that the cotton belonged in.

Q. What was done with the cotton after it was located, if anything?

A. It was put there ready for the ship to take it away. That was its location and very seldom moved out of its location. After it was thus located these skeletons were brought into the office and checked up to see that they were right. The location of the posts where the cotton had been discharged and all the record needed was put on the cotton record. Then the skeletons, an impression copy of the same was taken, and they were fo-warded to the New Orleans office. I do not know what was done with them after they were taken to the New Orleans office.

Q. Do you know what further steps were taken at the New Orleans office with reference to the transfers which have been produced here?

A. I have seen the transfers. I did not help make them. I had nothing to do with the posting of them.

Q. What next in the matter at Westwego, with reference to the handling of this cotton, would come to your knowledge?

A. When the ship wanted the cotton she came there and we showed it to them in the shed and they took it out of its location and put it aboard the ship. The steamship company did that. They employed two classes of labor, they had longshoremen who would take it from its location and truck it to the reach of the tackle, and the screwmen who would take it and put it on the ship. They were entirely separate organizations. None of these employees were in the employ of the railway company in taking that cotton from its location and putting it on board the ship. No part of the expense of that handling was paid by the railroad company.

60 Q. These marks on the cotton—will you explain to the jury what purpose they serve, these arbitrary marks, I X J, and so on?

A. Each shipper has his own mark which is to designate the cotton and the grade, and so it can be kept track of to go through to its destination. If it was not marked one bale would be like

every bale, they would be paying for low grade for higher right along. In locating this cotton on the wharf the cotton having the same designation was kept in a complete package or parcel or bunch. If we discharged a car of fifty bales we would put it together and tag it, showing the car it came out and the mark, and not only tag it in one place but in two or three, and hide them so that they could not be destroyed and could be readily found.

Q. Exhibit "Z 1006" has been produced here, do you recognize that as anything that was in use in your business there in Westwego (handing witness the exhibit)?

A. I received papers similar to that and also that paper. There is writing on there that I can identify; that writing on there is made by one particular clerk of mine.

Q. How did it come to you in the course of business—there—papers like that?

Mr. CLEVELAND: Papers like that?

Mr. TAGGART: That or papers like it.

A. Yes, sir; it came some time in the mail from New Orleans; sometimes it came by special messenger; it varied.

Q. What information did the receipt of such a paper convey to you, under the custom of business there at Westwego?

A. That a ship would arrive at the wharf and take the cotton called for in that list. That was not the only method I had of learning that a ship was going to arrive or of learning the cotton that the ship would take.

Q. What other method was there in the custom of doing business there?

61 A. I would frequently get a telephone message what ship would be there and to give her what she would take. I would also have a stevedore that was handling cotton come in and say, "I will just take all this." Then they would jam in everything if the bill of lading was complete. By saying if the bill of lading is complete, I mean, for instance, F 43 from Temple calls for 200 bales of cotton split up into four or five or six lots, we would not consider that bill of lading complete until all that cotton had arrived there ready for delivery. Unloaded on the wharf ready, or the cars so that we could put it right to them.

We received those telephone communications from the New Orleans office, and we also received them from the steamship agent asking me to give them the cotton. From Elder, Dempster & Company I would receive the communications by telephone, with no relation to a communication of this sort, pretty near as often as I would get one of those memorandums.

Q. Have you ever had any talk with any representative of Elder, Dempster & Company respecting the giving of cotton to a ship that had room for it, where the bills of lading were complete, without regard to the question of whether the transfer of skeletons had been forwarded from Westwego?

A. I have with the senior Mr. Warriner, the agent of Elder, Dempster & Company, and with Mr. Powers, their head stevedore.

Mr. Warriner said on that subject to give them all she could take, that is where the bills of lading were complete; of course we would not make delivery unless the bills of lading were complete. I had that conversation over the telephone and I have had it on the wharf with the stevedore.

Q. From what parts of the wharf would these longshoremen and stevedores take this cotton when these ships came there to receive the cotton?

A. Where it was located; go right to the location. There was no distinction between cotton located at the extreme rear parts
62 of the wharf and cotton located in the front or within a certain distance; they would take it anywhere. No compensation was ever paid by the railroad company for cotton taken from a certain point.

Q. Will you mark the location on this diagram of posts 1 and 3 and what you call the "south margin" or "south wharf" as located in these skeletons? Just mark that place.

A. (Marking with blue pencil.) That entire space is "south margin" between the black lines.

Q. This cotton, I understand, was Bremen cotton. Was there an accumulation of Bremen cotton there at the time of the fire?

A. A very large accumulation. Pretty near half the cotton there was Bremen cotton.

Q. Can you state, respecting that Bremen cotton, what was the cause of that accumulation?

A. Yes, sir. We had several thousand bales that arrived early in October that lay there, and it kept coming on, taking the place in the shed, filling it up. I talked with the agent once on the wharf, or twice, and I would say not less than once and I think twice over the 'phone, and with Mr. Powers, the chief stevedore. I conversed almost daily, asking when we would get relief.

Q. What was stated as to a ship?

A. He promised a ship day in and day out, saying we would have one tomorrow and one next day. Along the latter part of October he told me one day——

Q. Was this Mr. Warriner?

A. This was Mr. Powers.

Q. Do you know anything beyond what Mr. Powers told you about that?

A. Except that Mr. Warriner told me time and again he would give us a ship. He told me personally and, as I have said, through the 'phone once or twice. Mr. Warriner said the ship would be there in a very few days; he kept promising, but it did not come.

Q. From what time?

63 A. From before the middle of October up to November 12th. That is all I know in regard to the ships except what Powers, his head man, told me.

Mr. TAGGART: I offer this map in evidence as part of the witness' testimony, simply as to the parts to which I have addressed my questions—the outline of the wharf, the outline of the sheds, the location of the cotton and the tracks.

The map marked for identification Exhibit 16 is now marked in evidence and is made a part hereof (printed *post*, at pages 137 *et seq.*).

Cross-examination by Mr. CLEVELAND:

I am in the employment of the defendant in this action. I have been in its employment since January previous to the fire, except from November, when I quit them, up to March following. I quit work for them on the 27th day of November, 1894; then I went to Chicago.

Q. And shortly after the commencement of this action you were employed again, were you not?

A. If you want to know I will give you the facts about it. The insurance company came to Chicago and tried to employ me and I refused to work for them. After that I went to work for the Texas and Pacific railway.

Q. I ask for a date, can you give it to me?

The COURT: He said the 27th of November.

Mr. CLEVELAND: That was the date he was discharged, or left their employment. I am asking when he was re-employed.

The WITNESS: I said I quit. I have a copy of my resignation if you would like to look at it.

By the COURT: What was the date that you came back?

64 A. I resumed the service of the company on the 8th day of March, 1895.

By Mr. CLEVELAND:

I have been in their employment ever since. At Paris, Texas, from the 8th of March, 1895, to August 14, 1896, and from August 14, 1896, until I came to New York the other day, at Clarksville, Red River county, Texas. I left there on the 5th of the month.

Q. And this is the second time that you have been to New York to testify in cases involving this fire?

A. This is the second time that I have testified in New York. I think I testified in the Clayton case in April, 1897. I came here for that purpose; I didn't come here for my health.

I never saw a bill of lading at Westwego; I don't remember of seeing any bill of lading at Westwego.

Q. Were you ever at a terminal at New Orleans of the Texas and Pacific railroad?

A. I have been at their depots where they handle their business, very frequently, if you term that a terminal.

Q. They had terminals there, didn't they?

A. I don't know in what sense you call it a terminal, they had delivery warehouses and tracks, and handled freight, but they had no pier for ships to come alongside and take cargo.

Q. Their main track ran to Gouldsboro, didn't it?

A. The line ran to Gouldsboro.

Q. This was a little branch that ran up to Westwego, was it not?

A. Westwego was just the same as over here in Jersey City.

Q. Will you answer my question?

A. No, sir; it was not any branch that ran to Westwego; it was a yard. At Gouldsboro they were in the habit of taking cars
65 on floats and carrying them over to New Orleans to their docks there, and unloading the cars at their depot or freight shed, whatever they may have been, at New Orleans, or switching them to some other line. I think I have seen a waybill at Westwego which read from a point in Texas to Westwego; I do not remember what waybill it was. None of the waybills in this suit read that way, these read from Temple to New Orleans. It would be pretty difficult for me to say what waybill I ever saw in Westwego that read from a point in Texas to Westwego, mentioning Westwego; I say I have seen a good many, to the best of my recollection.

Q. Will you swear that you saw one?

A. I have stated what I say. I have billed them, lots of them, myself. I would not like to say how many; I would not make any statement as to how many. I have handled, maybe, a thousand or fifteen hundred waybills, and it is difficult to go back five years and identify a waybill out of a lot.

Q. Did you have any part in making out the waybills?

A. I would not be able to make them out in Texas, if I was at Westwego. I did not have any part in making out a waybill to Westwego before the fire. I had to do with handling the waybills at Westwego right along. About eight months in the year I did not have any clerk and I had to handle about all that came in, along after the cotton season is over; it is owing to how heavy a cotton season they have, say seven months in the year, from April up until the latter part of September or middle of September, I handled waybills. From that time to the date of the fire I had something to do with waybills. I would very frequently register a waybill, make a skeleton, put it in the book and go and unload a car. I did anything that came around that was necessary. I was running the place up there.

66 Q. Was there any facility for handling or transferring cars from Westwego to New Orleans?

A. No transfer boat there; no, sir. There was no tracks on which cars could be taken by boat from Westwego.

Q. Did you ever work four ships at Westwego?

A. Yes, we have had them double. I could not exactly say what date. I cannot give you a date, some time in the fall; I could not say exactly what date. I could not say on how many occasions. I could not say what ships they were.

Q. Who were their captains?

A. You don't suppose that I know the names of the captains of the ships?

Q. How long were they there or any one of them?

A. They varied. I could not tell how many days four ships lay at our dock two abreast.

Q. Ever?

A. I stated to the best of my knowledge they had.

Q. How long?

A. I answered that question a moment ago. I couldn't tell you who were the stevedores that worked the cotton across the ship next to the dock.

Q. Who was the stevedore that took the cotton off on the ship farthest away from the dock?

A. I remember, in one instance, where Lincoln took some cotton across to a ship on the other side. I suppose the one next to the dock on that occasion was a cotton ship. I think so. To the best of my knowledge and belief I recollect it.

Q. What was the name of that vessel?

A. I will give it up. I couldn't tell what was the name of the vessel that Lincoln had charge of.

Q. From the time that cotton generally was unloaded from the cars and put in its place on the dock, until the ship arrived which was to take the cotton, in whose custody was the cotton?

A. We attended to the watching of it; we watched the cotton. If it was moved we moved it, but it was not supposed to be
67 moved. If it was repiled we did it, but we were not supposed to repile it; it was very seldom repiled.

Q. How did you manage to have the cotton that was on top delivered always first?

A. I don't understand what you mean.

Q. Did it not very frequently happen that a ship came there and took cotton that was at the bottom of the pile?

A. No, sir. We had more sense than to pile two lots on one pile. We made a separate pile for each lot and left gangways, so that we could get to it. In no instance that I remember was one lot piled on another.

Q. Do you recollect anything about the cotton in this suit, Exhibit 6, the 20 bales that were put in post 1—do you know anything about that?

A. I only know that the record shows that it was at post 1.

Q. How near post 1 was it?

A. There was a space between those posts, and post 1 would run from here to that water-cooler yonder, very near, anywhere in it that would be its location.

Q. Anywhere within forty feet of post 1?

A. No, but post 1 ran to post 2, and it could not go beyond post 2.

Q. How far from post 1; anywhere within thirty feet of post 1 you would call post 1?

A. There were posts this way (illustrating).

By the COURT: He means in the direction of post 2. You say 30 feet anywhere from post 1. That takes you in both directions?

The WITNESS: There were two posts standing upright, and post 1 was marked inside of the first post and the inside of the second post. The space in between there was post 1.

Q. How far north and south of post 1 did post 1 location run?

68 A. I suppose those posts were thirty or forty feet apart. The "south margin" was seventy feet wide. It was as long

as the width of the wharf. I think it was 240 feet; from 160 to 240; I don't remember exactly. It was the entire width crosswise, back to the tracks from the river front.

Whenever the stevedores or officers of the ship or persons who were to take cotton came to the dock the first thing they did was to come to the office to ask for their cotton and to find out where it was and myself, or one of my assistants, went around and pointed it out to them. I never allowed any cotton to leave the dock without having mate's receipts for it if I knew it.

Q. That dock was under the control, was it not, of the Texas and Pacific Railway Company?

A. It was there for the interchange and handling of business.

Q. Answer the question.

A. They owned the dock; yes.

Q. And they controlled it as far as you know, didn't they?

A. Yes, sir.

Q. And every part of it; is that right?

A. They controlled the dock.

Q. And every part of it?

A. I suppose so.

Q. As far as you know, it was within your knowledge, was it not?

A. We controlled the dock; we had charge of the dock.

By the COURT:

Q. He asked you if you controlled every part of the dock.

A. Yes.

By Mr. CLEVELAND: You don't mean to say that Bremen cotton was all kept in No. 1 shed, do you?

A. Except that there might have been scattered bales that sometimes came in on a mixed car and got in No. 2, otherwise it was all in No. 1.

69 Q. "South margin" was not in No. 1 shed, was it?

A. Yes, and No. 2 was the upper part. We called it the shed or platform. "South margin" was not covered, it was all open.

Q. Is it not a fact that the cotton for Bremen was part in No. 1 and part in No. 2?

A. There might have been an isolated case where there was a bale or two put in No. 2; ordinarily it all went into No. 1, as I stated previously and all the Liverpool in No. 2. We endeavored to keep it so.

Q. On the night of November 12 you had about 20,000 bales on the dock; didn't you?

A. In No. 1 and No. 2 both, but we could have taken a great deal more.

Q. And you had a great many cars on the dock that you could not unload; is not that the fact?

A. We could have unloaded on the 12th if we had desired. We had room. But we did not desire to. That is the only reason we did not unload. If we had desired we could have done so.

I received Defendant's Exhibit H from the New Orleans office of

the Texas and Pacific. All papers of similar character I received from the New Orleans office.

Q. When you were here in April, 1897, did you testify as follows:

"Q. Had you any particular shed for cotton destined for any particular place?

"A. Yes, sir; we tried to divide it off so that we could berth a vessel, and when she came there to get the cotton she could take it from the most convenient point, saving trucking a long way."

Did you testify to that?

A. I think so. That is substantially what I have testified today.

Q. Did you testify so?

A. If you say that is my testimony.

70 Q. Did you testify as follows:

"Q. What different points had you for different destinations?

A. We had the east end, No. 2 shed, or down river, full of Bremen cotton, had been there quite a while, and we had Havre and Genoa toward the middle of the two sheds and the bulk of the Liverpool in No. 2 shed, some of it in No. 1."

Did you testify that way?

A. No, sir—I did not. That is an error of the stenographer. I testified that the Bremen cotton was in No. 1 shed.

Q. When the ship came there for cotton, and the cotton happened to be more than seventy-five feet off, or 100 feet away, still the railroad employees did not help the ship's employees?

A. No, sir. We might in some instances, to help ourselves, give her a few bales of cotton, but the ship was supposed to take the cotton where it was lying on the wharf. The railroad employees did not help the ship.

Q. They just let the ship stay there, no matter how anxious they were to get rid of the cotton, and the railroad employees were idle?

A. As I explained before, the longshoremen will not let outsiders help them. They have to get the same salary.

Q. So that when the longshoremen could not keep the ship's winches busy taking care of the cotton, the railroad employees would not help them?

A. They had nothing to do with it. They did not. They did not help them truck cotton at all; not supposed to. They never did. I testified yesterday that the reason we did not unload a single car on the day of the fire was that we were busy delivering meal and cake to a Dutch ship, and the Malabar and an Englishman had another shed, and making room in the shed.

71 Redirect examination by Mr. TAGGART:

Q. You were inquired of as to your testimony in the Clayton case that the No. 2 was the down or east shed?

A. It was an error of the stenographer, I never testified that. It

was all No. 1 shed. That is the portion of the Clayton record to which I called your attention as an error.

Q. You were inquired of as to whether you did not go back into the service of the Texas and Pacific Railroad Company shortly after these suits were commenced; did you know anything about the commencement of these suits?

A. Nothing whatever. I don't know when they were commenced, nothing whatever about them.

EDWARD L. SARGENT, having been duly sworn, being examined by Mr. Taggart as a witness on behalf of the defendant, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. TAGGART:

I am general freight agent of the Texas and Pacific railway. I reside at Dallas, Texas. I have been general freight agent since September 1, 1892. I am acquainted with the Messrs. Warriner of New Orleans.

Q. Have you had any conversation with them at any time prior to November 12, 1894, respecting the place where their steamers would receive cotton from the Texas and Pacific Railway Company?

A. Yes, sir. I have had a conversation with Mr. Warriner, of the Elder Dempster Company. The particular time was on the 27th of September, 1894. That conversation related to the place of delivery of cotton.

Q. What was that conversation?

72 A. I called on Mr. Warriner, who represents Elder Dempster at New Orleans, in reference to making a large contract for cotton to be delivered to him to be taken to Liverpool. We didn't close on that day because he wanted to consult his principals who, I believe, are located in Liverpool. We offered him a certain figure for the transportation of 20,000 bales of cotton to be received by him at Westwego and delivered at Liverpool. He was to cable that day and I went back to my headquarters at Dallas. On the 29th of September I had a telegram from Mr. Miller which stated that he had heard from his principal. Cotton was subsequently delivered to Westwego.

Q. And what was said with respect to the terms of the delivery or on what conditions cotton would be delivered at Westwego at the time of this conversation?

A. You mean as to the time of delivery there?

Q. No, as to the size of the lots?

A. Mr. Warriner said he would send his ships there for any amount over 500 bales.

GEORGE W. ROTH, having been duly sworn, being examined by Mr. Taggart as a witness on behalf of the defendant, testifies as follows (his testimony being read from a deposition previously taken in the cause):

I reside in New Orleans; my business is superintendent at Westwego. I have been superintendent of the elevator part since July, 1892. Since January 1, 1895, I have been superintendent of the wharf. In November, 1894, I was on duty there as superintendent of the elevator.

Q. Will you look at this which I show you and state what it is?

A. It is a port regulation for Westwego.

Q. From whom did you receive that?

A. From Mr. Cope, president of the board of harbor masters. Mr. Cope, Mr. Fitzgerald and Mr. Dean were the parties who brought it to me at Westwego. They stated when they brought it
73 that I was to be the sole judge of what right one ship would have over another in the movement of vessels in the absence of the harbor master. This resolution was adopted January 10. I could not say exactly what the time was they brought it over. It must have been probably two or three days after that date, in the year 1894. There was no writing given by them to me evidencing my authority to act for them. They simply mentioned this tenth clause. They said I was to act and be their agent there. And these gentlemen were the harbor masters, and Mr. Cope was the president, and this is the paper which they furnished me.

EDWARD L. COPE, having been duly sworn, being examined by Mr. Taggart as a witness on behalf of the defendant, testified as follows (his testimony being read from a deposition previously taken in the cause):

I reside in the city of New Orleans; I am deputy commissioner and superintendent of the port of New Orleans at present. In 1894 I was harbor master and president of the board of harbor masters at that time. I am now deputy commissioner. By act No. 70, of 1896, there was a port commission created which superseded the board of harbor masters. I have custody of the records of the board of harbor masters for 1894, and they are still in my possession. I have the proceedings of that board of the 10th of January, 1894.

The book produced.

This is the record to which I refer of the board of harbor masters. The record of the meeting of January 10th, 1894, is as follows:

"Board of harbor masters, port of — Orleans.

"The meeting was called to order by the president and the following members were present: Edward L. Cope, Jno. J. Fitz-
74 gerald, E. D. Dean and John Davidson; absent, Geo. Buchert. The object of the meeting was to adopt rules and port regulations to govern Westwego. The following rules and port regulations were unanimously adopted:

"First. The harbor master has authority by law to regulate, moor and station all vessels at the wharf and to remove them from time to time to make room for others, and the degree of accommodation which one vessel shall afford to another the harbor master is constituted sole judge.

"Second. Vessels coming to the wharf must have their yards braced sharp up by the port braces, their port anchor cocked-billed, or at the hawse ready to let go. Boats, bumpkins and davits to be rigged inboard.

"Third. Jib-booms must be rigged in the full length before landing, and no jib-booms shall be rigged out unless by permission from the harbor master, and then at their own risk.

"Fourth. Any person cutting or interfering with the moorings of any vessels will be punished according to law.

"Fifth. Any persons throwing ballast, rubbish or anything that will sink into the river, will be punished according to law.

"Sixth. The heating of pitch, tar or rosin is strictly prohibited on board any vessel lying at the wharf.

"Seventh. Vessels will not anchor at or near the wharves without permission of the harbor master.

"Eighth. No vessel shall change her berth without permission of the harbor master.

"Ninth. Masters of vessels failing to comply with the above rules will be held responsible for all damages in consequence, besides laying themselves liable under the law.

"Tenth. And in the absence of the harbor master the superintendent in charge is authorized to enforce these regulations,
75 and to designate what accommodation which one vessel shall afford to another in conducting their business.

"That the secretary and treasurer have a sufficient number of both port regulations applying to the east and west banks, and Westwego printed on large card-boards, and those applying to Westwego be sent to the superintendent with a letter designating how far he shall act in regard to section No. 10 of said port regulations.

"Having no other business on hand, the board adjourned.

"New Orleans, Jan. 10, 1894.

"(S'g'd), JOHN DAVIDSON,
"*Sec'y and Treas.*"

I remember going to Westwego with one of my colleagues and introducing him to the superintendent there; I do not remember the exact date. I believe the superintendent's name there was Roth at the time, but I am not sure. He was the gentleman connected with the elevator. He was considered the superintendent of the wharves there, was acting as manager of the wharves, I believe.

Q. And under section 10 of the resolutions adopted, or the rules adopted on the 10th of January, what appointment, if any, was made at Westwego?

A. Those resolutions were passed with the object of deputizing the superintendents of the wharfs, over at Westwego, and clothing him with authority there, by the harbor master, to move vessels in the

event of the harbor master's not being there. I don't know whether that is section 10 or not, but that was the object of the meeting. I do not remember the resolutions exactly, but it was simply to designate a superintendent of wharves over there, who should have charge of locating vessels at that wharf. I recognize the paper this morning; it was printed in accordance with those resolutions and paid for by the board of harbor masters. It was a copy of that which was taken by us to Westwego. One or more copies
76 were printed expressly for Westwego under that resolution of the board of harbor masters.

Q. Now, then, do you know who acted in 1894 in regard to collecting harbor dues under a State statute from vessels in New Orleans?

A. The harbor masters collected from 1882, or rather, from 1888 to 1894, to my positive knowledge, because I was a member of the board of harbor masters.

Q. What do you know about the collection of harbor dues of vessels going to Westwego?

A. The harbor masters collected all dues from vessels that went to Westwego during the year 1894—from 1888 to 1894.

Q. And you mean the whole of 1894 in your answer?

A. Yes, sir. There was no difference at all in the harbor dues at Westwego and other points in New Orleans.

Cross-examination by Mr. CLEVELAND:

Q. By what act was the board of harbor masters created?

A. The harbor masters—it's in the Statutes of Louisiana, page 698, article 3, section 1681. That was the creation of the board of harbor masters, of whom there were five appointed by the governor of the State of Louisiana.

Q. Who put the board of harbor masters in motion in relation to Westwego?

A. The board of harbor masters, proper, in the city of New Orleans. Who put them in motion in relation to Westwego, and why did we take this action, we took this action because we considered the law gave us authority to deputize any one over there, and I think, if you will look over the law, you will find the harbor masters have authority, by law, to deputize any one to fill their place. The book which I have produced contains all the minutes of all the
77 meetings held by the harbor masters until the dissolution of the board, that is from the time I was there.

Q. I see there was a meeting held June 15, 1884, and one on November 27, 1888?

A. That was when I was first appointed; one on December 1, 1888; one on February 6, 1889; one in February, 1890, one November 7, 1890; one on December 1, 1890; one on December 7, 1890; one on July 27, 1892; one September 23, 1892; one on January 9, 1893; one on February 1, 1893, and the next seems to have been on January 10, 1894. Nobody asked us to adopt those resolutions, on January 10, 1894. It was not brought to our attention by the Texas

and Pacific Railway Company. We did it of our own motion. We came to the conclusion that we had power to adopt rules and regulations concerning Westwego from the fact that we thought Westwego was in the port of New Orleans, or it was a question whether it was in the port of New Orleans, and we did it believing it to be a part of the port of New Orleans. We have since ascertained that it was not a part of the port at that time. We know there has been a law passed incorporating it since as a part of the port of New Orleans. At that time we believed it to be a part of the port of New Orleans, and believed it to be a portion of our collection district. We have since ascertained our mistake by the passing of the law incorporating it in the port of New Orleans.

Redirect examination by Mr. TAGGART:

Q. With reference to its now being within the port of New Orleans, in reference to the statutes of the United States?

A. Yes, sir; we always considered it a part of the port of New Orleans, and did at the time, and was surprised when we found it was not included in the custom-house business.

Defendant thereupon offered paper in evidence identified
78 by witness Roth, and the same was marked "Exhibit Z 1026" aud made a part hereof (printed p. 152, *post*).

(Defendant rests.)

This being all the testimony offered by the defendant in the above-entitled cause, plaintiffs' counsel thereupon called the following witnesses:

ROBERT J. PERKINS, sworn and examined as a witness on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. CLEVELAND:

I am an attorney and counsellor at law, practicing in the State of Louisiana. I have an office in New Orleans. I live just outside of the city of New Orleans, in the parish of Jefferson. I have resided in the parish of Jefferson about sixteen or eighteen years. New Orleans is on both sides of the river, and so is the parish of Jefferson.

Q. Do you live in any town in the parish of Jefferson?

A. No, sir; it is not a town. I know the place called Westwego.

Q. Tell me what it was in 1894?

A. Westwego is in the parish of Jefferson, opposite the city of New Orleans, that is, across the river. It is on the west bank of the river. In 1894 there was nothing there except houses that have been built around this railroad terminal. Before the railroad acquired this property, or built its wharves there, there was practically nothing there. Since that time a number of houses have been built and occupied principally by people who work there at the wharves. Before the wharf was built there was nothing there except the mud bank, the levee, which was on either side of the river and goes all

the way up the river up above the State of Arkansas. There
79 is a steam ferry across from New Orleans to Westwego. I do not think that ferry was there prior to the building of the docks. To get across the river then you would have to go over in a skiff or a rowboat. In 1894, the docks consisted of a wooden structure built upon piles, which were driven on the side of the river, with two sheds on the wharf. I am not able to state where, prior to the building of this dock, the Texas and Pacific Railway Company had its terminal.

The map which you now show me approximately represents Westwego as it existed in November, 1894, as well as I am able to judge; as well as I can say, that is a good representation of the situation there.

Plaintiffs' counsel offers the map in evidence, subject to correction. Admitted, marked Plaintiffs' Exhibit D, and made a part hereof (printed *post* at p. 120, *et seq.*).

In 1894, at Westwego, there was no other dock, public or private, except the dock of the terminal of the Texas and Pacific Railway Company and this ferry that I speak of.

Cross-examination by Mr. TAGGART:

Q. You have known this wharf how long?

A. I had been there before the wharf was built. I know just when the wharf was built. I think it was completed in 1893. I am telling you that from what I have learned, not from what I remember. I can only say that I remember it was about that time; whether it was in 1892 or 1893, I am not sure. It was a large structure in 1894. Besides the wharf there is an elevator for the loading of grain, and a connection from that elevator down to the water where ships can load grain.

Q. And it is, to your knowledge, a place of transfer from the railway to the steamships of cotton, is it not?

A. From the Texas and Pacific railway?

Q. Yes, and has been since it was built?

80 A. Ever since the dock was built.

Q. So far as you know it is the only place of transfer of cotton for export to the vessels from the Texas and Pacific Railway Company?

A. I do not know that fact. I do not know of my own knowledge of any other place of transfer of cotton from the Texas and Pacific railway. I know of its being a place of transfer, but, of course, I know of the places in New Orleans where the Texas and Pacific delivers. There are other places where the Texas and Pacific has freight sheds and freight docks. But what is done there I do not know of my own knowledge.

CHARLES K. LINCOLN, recalled and examined by Mr. Cleveland as a witness on behalf of the plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I was a stevedore during November, 1894. I am somewhat familiar with the place called Westwego.

Q. What is Westwego, is there a town there?

A. Well, no; no town. The nearest house to the dock, outside of the elevator, is a thousand or fifteen hundred feet, I should say, from the wharf, toward the upper part.

Q. How do you reach Westwego from New Orleans?

A. There is a ferry running across the upper part of the city just above Audubon park. The ferry landing is very nearly a quarter of a mile from the dock at Westwego.

THOMAS N. BOYLAN, having been duly sworn, being examined by Mr. Cleveland as a witness on behalf of the plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

81 Direct examination by Mr. CLEVELAND:

I am principal of the Boylan detective agency. I have been connected with the police since 1855, in New Orleans, and have served in almost every capacity, as chief of police and superintendent, and this agency was organized in April or May, 1880. Mr. Farrell was then the principal. He died during the exposition in January, 1885, and I assumed the duties from that time to this, as the principal.

Q. You know the place called Westwego?

A. Yes, sir; I know of it. I think it is in the parish of Jefferson, adjoining the parish of Orleans.

Q. And had it in November, 1894, any city, village or county police protection?

A. They had a police jury and sheriff and marshal, one or two men; I don't know that there were any more than that; that is, for the town of Gretna. I think Westwego was under the jurisdiction of Gretna. I think there are several fire-engines in the town of Gretna; there were some time ago. I won't say positively there was in November, 1894. I know there has been, but I have not been over there for a good while. I do not know how far from the Texas and Pacific Railway Company's dock at Westwego the nearest fire-engine house was in November, 1894. I am not familiar with Gretna nor with Westwego. That is the duty entirely of our superintendent and captain; considered the harbor work. I could not say positively whether the Westwego town, city or county authorities furnished police protection to the Texas and Pacific Railway Company, but I hardly think they did. I have not ascertained yet how near the nearest fire-engine house was to the dock. I am not

familiar with that part of the river. For many years I have not been over there. I have never been at Westwego since that cotton shed was put up there. I have been there before the fire, but never while that cotton shed was there, but before that cotton shed
82 was in existence. Since the cotton shed was built I have never been there. I know nothing of the conditions surrounding the cotton at Westwego.

Q. What is the cotton season?

A. Well, it commences about—sometimes it is earlier than others—but along in September, about the middle of September, you may say, it will commence.

Q. And closes when?

A. It gradually increases from September until about the middle of the winter, and it really closes about May. There is a little here then, but not a great deal, unless it is stored in the presses, and so on.

WILLIAM J. O'CONNOR, having been duly sworn, being examined by Mr. Cleveland as a witness on behalf of the plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I live in New Orleans; will be forty-nine in December, and am superintendent of Boylan's protection police and detective agency. I have been superintendent since May, 1893, and prior to May, 1893, I was captain of the Boylan's police. I think I have been in that business from September, 1884.

Q. Did you know that Westwego was without police protection except such as was furnished by the Boylan people?

A. Well we always understood that the parish of Jefferson has police of its own.

Q. How near to Westwego?

A. Well I expect they were pretty nearly down to Gretna all the time.

Q. How near to Westwego was the nearest policeman in your judgment?

A. Well, in my judgment, it is pretty hard to get one. There are some over there, but they have a good deal of territory to cover.

Q. You know whether Westwego had any fire protection from the parish of Jefferson?

83 A. Never heard of their having any, sir, outside of the town of Gretna; I don't know whether there is an engine at Harvey's canal or not, but I don't think there is.

JAMES P. MCARDLE, having been duly sworn, being examined by Mr. Cleveland as a witness on behalf of the plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am captain of Boylan's police force, and have been such almost seventeen years, here in New Orleans.

Q. When last did you visit Westwego before November 12, 1894?

A. Well, I was not in the habit of visiting Westwego—I don't think I was over there twice before that, altogether. Each time I went there I went there to see the captains of vessels that were lying there; that was what brought me to Westwego; it was an out-of-the-way place, and I didn't go there except on special occasions. I could not give you the date when I was last over there before November 12. I think it must have been within a month or two of that time; yes, it was a month or a month and a half before this time.

Q. Did you understand whether Westwego had any independent fire protection from any city or town authorities?

A. I don't know anything about that. It did not have any police protection to my knowledge. I do not know how many watchmen the Texas and Pacific had at Westwego, outside of our own.

HENRY L. ZANDER, sworn and examined as a witness on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. CLEVELAND:

I reside in New Orleans and have resided there pretty
84 nearly all my life. I am an engineer and surveyor. I have come here at the request of the plaintiffs. I have made a map of that portion of the Mississippi river in the city of New Orleans, including Westwego. This is the paper which you now show me, which is marked Plaintiffs' Exhibit D.

Mr. CLEVELAND: I call attention to chapter 692 of the acts of Congress -proved July 23, 1888, volume 25 of the U. S. Statutes, page 339.

The COURT: Can you locate that area upon this map?

Mr. CLEVELAND: I will have him do so. The limits of a port are defined by extension, and perhaps I should go back to the first act, the Louisiana purchase; if it is seriously disputed I can go back; I have all the acts here; I suppose it is conceded as a matter of fact that the east bank of the river in the city of New Orleans is the port of New Orleans.

Mr. TAGGART: Yes.

The COURT: So from there you simply show your extensions?

Mr. CLEVELAND: Do you not concede——

Mr. TAGGART: I concede the fact, but I preserve an exception to the materiality of all this testimony.

Mr. CLEVELAND: I suppose your proposition is that the port of New Orleans is the actual place used as a harbor irrespective entirely of custom?

Mr. TAGGART: In fact; yes.

Mr. CLEVELAND: Then do you concede that it was not within the port of New Orleans as defined by the statutes of the United States in 1894—that is, that Westwego was not.

Mr. TAGGART: I concede this that prior to March 30, 1896, it was not within the designated limits of the port of entry, the customs district, as defined by the acts of Congress, that is, of course, subject to objection and exception as to its materiality.

The COURT: This concession is made without waiving at all any right to object to its materiality.

85 ROBERT J. PERKINS, recalled and examined as a witness on behalf of the plaintiffs, testified as follows:

Direct examination by Mr. CLEVELAND:

In November, 1894, I lived in the parish of Jefferson, above the city of New Orleans—on the other side of the river. I lived on the east bank. I am familiar with the district which includes Westwego.

Q. In 1894 what was the nearest town or hamlet on the west bank of the river to Westwego—collection of houses or village?

A. There was a place called Amesville, about two miles below Westwego. That only consisted of one store, one grocery store, barroom and two or three little houses. About three-quarters of a mile further down comes what is called Harvey. That has only two or three stores and some houses, but the nearest village is Gretna, which is the county-seat or parish seat of the Jefferson parish, and that, I should say, was about three miles to three and one-half below Westwego, that is on the river as well.

Q. In November, 1894, what police force existed in the district in which Westwego now is and then was?

Objected to as immaterial. Objection overruled. Exception by defendant.

A. The only police protection there at that time, or now is the sheriff and his deputies and the police, elected by the police jury. The police jury corresponds to the municipal board—county commissioners I think you call them here. The office of this police jury was in Gretna.

Q. Do you know what was the number of the police force?

A. I think only four or five in the whole parish at that time. The parish had a frontage on the river on that side I should
86 say of twelve miles, and on the other side of about eight or ten miles. In 1894 there was no fire-engine or engine for extinguishing fires at Westwego; the nearest was at Gretna. Gretna is from three to three and one-half miles away. You asked about police at that point. I might say that the different police officers were distributed over the parish, and there was one officer that

covered a certain distance along the river front, which included Westwego. His beat ran from Harvey's canal up to the upper line of the parish about five and one-half or six miles, I should say.

Cross-examination by Mr. TAGGART:

These police officers did not live in the house near the dock. Mr. Gassenberger was not a member of this police force at this time. He was deputy sheriff without pay; he had no duties except what he chose to do. This police officer, I think, a man named La Brun at that time, lived at Waggeman, at the upper end of the parish, about five miles away. There was no fire-engine nearer than Gretna. I mean any sort of a fire-engine, that is, either volunteer or paid fire department. They have only the volunteer department in Gretna. There are no fire-engines, in the usual sense of the term, anywhere in the parish except in those towns. I do not in my answer mean to say that there were no pumping engines there at the wharf. I do not know anything about the capacity of the pumps that were there. I refer to the fire department.

Westwego is at this point; Gretna is here; Amesville and Harvey are only put on this map by names; there are very few houses there; only one store at Amesville and one or two at Harvey, and they have a name, and I speak of them.

Q. Are they on the line of this railroad running down there on the west bank of the river?

A. Near the railroad; but there is no fire-engine at all;
87 there is no fire department between Westwego and Gretna. I should say it was about three and one-half miles from Gretna to Westwego; I think I am about right in that.

By Mr. CLEVELAND:

Q. What is the distance back from the river front of the parish of Jefferson?

A. It goes fifteen or twenty miles in some places, back from the river; at right angles with the river when the river runs north and south. This officer covered the whole parish; that part of the parish is very sparsely inhabited; it is only in the villages where we had officers at that time; and it is the same now, to any great number. This whole section up there back of Westwego and north of Westwego, and from Westwego down toward Gretna is largely unpopulated. There is only one plantation between Westwego and Gretna; it is swampy about half a mile back.

Q. The method of access to Westwego is on the east bank of the river, is it not; you come up to a point opposite Westwego and there a ferry leads across to a point near Westwego?

A. Yes; that is the way of getting at it from New Orleans, of course, from the Gretna side of the river there is a mud road up there; a mud road near the levee that runs in back a little distance from the wharf and on up. That is the only thing in the way of road or communication above Westwego.

Q. This point that is marked "Company canal" at the terminus of that is where the ferry landing is, is it not, or very near there?

A. Just above there, yes; the ferry is nearly straight across the river at that point from New Orleans. This Company canal is probably a thousand feet from the wharf or 1,500, about that, the map will show, somewhere around there.

By Mr. TAGGART: About 2,000 feet.

By Mr. CLEVELAND: Yes.

88 This map shows the main line of the Texas and Pacific Railroad Company. I will mark on the map the end of the main line, that is, the north end. The Texas and Pacific Railroad Company approaches New Orleans from the west.

Q. Mark on this map, if you please, what purports to be the most westerly portion of the Texas and Pacific railroad.

A. I mark it "W."

Q. And from that point, "W," the line runs in a westerly direction towards Texas?

A. Yes; from "W" the track runs as shown on the map in a southeasterly direction. It runs down to a place called Gouldsboro. At Gouldsboro are the Texas and Pacific yards and shops. And at that place they have an incline. It is necessary in crossing the river at any point—the Mississippi river—for a railroad to have a regular incline, so that the cars can get down and the transport-boats can come up and the tracks can join. At New Orleans the incline is arranged so that the cars can run on to the transports. That was so in 1894, and in 1894 that was the way that the Texas and Pacific Railway Company got across to the city of New Orleans its railroad freight, which it wished to take into New Orleans for any purpose, and it does yet.

Q. In 1894, when the cars were run on these transportation boats, where did they go into New Orleans, will you mark the points?

Objected to as immaterial. Objection overruled. Exception by defendant.

A. It goes right across the river there to the head of Thalia street.

Q. In 1894 did the New Orleans fire-engines cross the river?

A. I don't know of any ever having crossed.

Mr. CLEVELAND: On the back of these waybills, Exhibits 1 to 5, from Temple to New Orleans, are these words which were not read to the jury:

"Set out at Westwego," printed or stamped.

Mr. TAGGART: That was the fact.

89 W. J. HAMMOND, having been duly sworn, being examined by Mr. Cleveland as a witness on behalf of the plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am fifty-one years of age, reside in New Orleans, and am a steamship agent. I have been engaged in that occupation since 1875, in New Orleans. I represented a great many lines prior to 1894, and the same in 1894. These lines were engaged in carrying cargoes from New Orleans to Europe; cotton, grain and general cargoes. Prior to 1893 cotton was delivered to our ships for transportation, by whoever we engaged it from. We engaged it from the Texas and Pacific Railway Company all the time. Some of it was delivered at our wharf on the New Orleans side, and some at Westwego. Ever since the wharf has been built we sent our steamers over there on certain conditions.

I was familiar with the customs and usages existing at New Orleans in 1893 and 1894.

Q. Did you ever send a vessel to Westwego to load her cargo without having previously made some arrangement with the railway company and without sending a notification to the custom-house?

A. We always had to get permission and have an engagement with the Texas and Pacific before going there, because it was their own wharf and we had no right to go there unless we had it.

Q. Was there any arrangement between you and the Texas and Pacific Railway Company as to the number of bales which you would go to Westwego to receive?

A. It was always understood we should not go there for less than 1,000 bales on account of extra cost of towage involved and the loss of time; it wouldn't pay us to go there for a smaller quantity.

90 Q. Was there any time specified in which you should go to Westwego to receive cotton for your line?

A. It depended upon the engagement made with the railroad. I mean that in the season of 1893 and 1894 I would not send my vessels to Westwego for less than 1,000 bales unless it suited me, unless it suited my own convenience.

Q. Mr. Hammond, in 1893 and 1894 if the Texas and Pacific Railway Company had offered you for transportation on your vessels less than 1,000 bales of cotton, where, by the custom of the port of New Orleans, would such cotton have been received by you?

Objected to as immaterial and calling for the opinion of the witness. Objection overruled. Exception by defendant.

A. At the city-front wharves. Cotton was delivered to our wharf in New Orleans by the Texas and Pacific Railway Company in the usual way, by drays. The Texas and Pacific Railroad Company's draymen drayed it.

Q. Did you ever pay for such drayage?

A. All cotton must be delivered at the ship's side at the expense of the shipper.

Q. How was cotton received by you for transportation on your steamers?

A. Received alongside the ship by the mate. I mean at the ship's wharf, within reach of the ship's tackle, to use a common expression.

Q. If cotton tendered to you for shipment over your line at another dock than the dock of your line had not been delivered within reach of the ship's tackle would such tender have been good, according to the custom of the port of New Orleans?

Objected to as immaterial. Objection overruled. Exception by defendant.

91 A. No; it must be delivered within reach of the ship's tackle. I never paid for truckage for the carriage of cotton from a point not within reach of a ship's tackle to a point within reach of a ship's tackle. I pay the stevedore so much a bale.

Defendant's counsel reads from the deposition of Mr. HAMMOND, as follows:

Cross-examination by Mr. TAGGART:

Q. Mr. Hammond, were you the agent of any particular line of steamers in 1894?

A. Well, I am the agent for the Ross line, the Thompson line, and other lines, composing what is called the Hammond line composed of a lot of lines. A number of steamships which I was endeavoring to obtain freight for and making engagements for, from time to time. I was the agent for those lines in New Orleans. You cannot call them regular in the same sense as the Harrison and West India lines; they are composed, some of them, of regular lines, because they send the ships the same as other lines, but, of course, not as regular as the Harrison and West India lines. Some of them are tramp steamers and some of them are not; they come and go as freight is plentiful or not plentiful. What I call the Hammond line is composed of a number of ships of that sort which I can reach and get for the purpose of transporting freight.

Q. Now, then, that custom was about the delivery of cotton from the Texas and Pacific Railway Company here along the city front on this side—the New Orleans side—prior to the erection of this wharf after the erection of the wharf at Westwego that was the recognized place of delivery for export cotton was it not?

A. At Westwego—it was their terminal.

Q. And the steamship company goes over there in order to get its cotton for export on its steamer?

A. Oh yes; they go there, that is, for a certain amount of cotton.

Q. And in making arrangements for this export cotton it is
92 the custom of your line as well as other steamship lines, to make an arrangement for what is known as a through rate for cotton, is it not?

A. Yes, sir.

Q. For the shipment of two thousand, four thousand or six thousand bales as the case may be?

A. For one hundred bales—any quantity.

Q. Any quantity, at a given through rate which the steamship lines divide between themselves on certain proportions?

A. We make arrangements with the railroad, naming them our sea rate and they add on to it whatever it costs them to bring it to the ship's side.

Q. Those things are booked every day, are they now?

A. Every day—fifty bales, one hundred bales, a thousand bales or ten thousand bales.

Q. And the sea rate is the rate from the point of terminals of the railroad?

A. From the time it comes into the possession of the steamer until it reaches its destination.

Q. And that destination here is Liverpool or some other foreign port?

A. Liverpool, Bremen, Havre or other European port.

Q. And it is the custom to your knowledge, is it not, for the railroad company to make a contract with its agent at the point of shipment for a through rate, is it not?

A. You mean from the interior?

Q. Yes.

A. Yes, sir.

Q. And the custom is this, is it not, as an example, the representative, we will say, of the Gulf, Colorado and Santa Fé railroad arranges for the delivery by the railroad at the port of New Orleans—he arranges with respect to the service to that port, and then arranges from the port of New Orleans to Liverpool, that is the custom, is it not, to your knowledge?

A. Yes, sir; they would make an arrangement in the in-
93 terior, say at $1.50 through rate—we would get fifty cents and the railroad one dollar.

Q. And the railroad agents would make a stipulation with the shipper respecting the obligation of the railroad for its proportion?

A. The ship is only responsible from the time she takes charge for the sea rate. In bills of lading based upon shipments under arrangements for a through rate it was always customary to describe the point at which the railroad would deliver cotton, as New Orleans.

Q. And that was understood to be Westwego, was it not, in the case of the Texas and Pacific between the steamship lines?

A. Yes, sir; that is the way we understood it, for not less than 1,000 bales. After Westwego was built that was the understanding, but I am at a loss to know exactly when it was built. After this arrangement it was delivered at Westwego.

Q. And when New Orleans was named Westwego was included in that term as far as the Texas and Pacific was concerned?

A. Yes, sir.

Q. What would you say as to your best recollection on the subject of whether or not any export through cotton was received from the Texas and Pacific at any other point than Westwego in the year 1894 by your line?

A. I couldn't remember.

Q. You also received through export articles, oil cake, &c.?

A. Oil cake; and when the elevator was built at Westwego we received grain, hard wood, lumber, staves and everything. Cotton-seed meal and cake and I think we received provisions too, general cargoes.

Q. Now, you say you always had permission of the railway company; you mean by that that you did not go to Westwego unless it was for some of these articles which you had arranged for export shipment?

94 A. That was the only reason we would have for going there.

Q. But you do not mean any permission apart from that?

A. We would, of course, have to ask the wharfinger if there was room to go in there.

Q. But as to the question of room you never had any special permission from the railroad company?

A. When we were going to send a ship there we always made inquiry, always asked them and never went in without permission.

Q. But by that you do not mean to say that you required permission from the railroad to go there?

A. I consider that equivalent to asking permission. It was a private wharf and we could not go there without asking permission. It is limited in capacity, of course, to a certain extent. I did not want to send a ship until I knew there was sufficient freight there to warrant me in going. When I was informed as to a certain quantity of freight being there for shipment by steamer it was a question for me to determine whether to send the ship or not. The stevedore that I speak of is employed by me to load the ship at so much a bale. And so far as he is under anybody's direction he is under the steamship company's direction. I have been inquired of respecting the getting of cotton within the ship's length. That is generally understood to be on the wharf alongside the ship, where it can be reached by the men, either by the railroad or trucking it. We have nothing to do with that; we pay a certain price per bale. It does not make really, as a matter of fact, any difference how far off it may come. We pay so much a bale to have it put aboard the ship.

A. And what they pay to get it from the place at which it was pointed out to them, or how far they have to go to get it, you do not know, as a matter of fact?

A. I don't know anything about that, but, of course, they
95 take pretty good care that they don't spend too much money on labor. They limit their labor as much as possible. Don't truck it any further than is absolutely necessary. Trucking is not

necessary unless it is a considerable distance. I don't know as a matter of fact whether they ever truck it at all, because I seldom go to those places.

Q. After the erection of the dock it was recognized as commercially within the port of New Orleans—there were regular deliveries at Westwego?

A. We called it New Orleans, although it was not officially New Orleans.

Q. And under bills of lading for shipment by the Texas and Pacific it means New Orleans, and the Hammond and various lines of steamers received cotton continuously at Westwego, did they not?

A. Yes, sir.

MATTHEW WARRINER, recalled and examined as a witness on behalf of the plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am familiar with the customs and usages existing at New Orleans relative to the shipment of cotton from that place to a foreign port. I was familiar with such customs and usages in 1893 and 1894. I never sent a vessel to Westwego to load cargo without having previously made some arrangement with the railroad company.

Q. In November, 1894, did you have any arrangement with the Texas and Pacific Railway Company relative to the receipt of cotton by you from it?

A. We had a number of contracts to carry cotton from New Orleans to foreign ports, where we had agreed to take it at Westwego if a sufficient quantity was there.

Q. What was the arrangement as to a sufficient quantity; what do you mean by "sufficient quantity"?

96 A. We would not send a ship for less than 2,000 bales, or so, so as to keep us working at least a whole day.

Q. Then, do you mean to say that in the season of 1893 and 1894 you would not send your vessel to Westwego for less than 2,000 bales?

A. That was our practice then.

Q. Did you ever have any arrangement or contract with the railroad company to go to Westwego for less than 2,000 bales?

A. I do not remember of any.

Q. In 1893 and 1894 if the Texas and Pacific Railway Company had offered you for transportation on your ships less than 2,000 bales of cotton, where, by the custom of the port of New Orleans, would such cotton have been received by you?

A. In the city, in the absence of any especial agreement. On the New Orleans side.

Q. Mr. Warriner, how was cotton received by you for transportation on your ships, at docks other than your own dock?

A. In the same way that it was received on our own dock, exactly. The cotton was tendered, and the mate or receiving officer counts it and signs a receipt for it.

Q. Will you please state whether or not such cotton was required to be placed at any particular point before it would be receipted for by the officer of the ship whose duty it was to receive it?

A. The cotton was placed within reach of the ship's tackle always.

Q. Was this custom universal to your own knowledge?

A. Certainly. By within reach of the ship's tackle I mean within a reasonable distance of the ship's tackle—abreast of the ship.

Q. If cotton tendered to a ship of your line at a dock other than the dock of your line had not been placed within reach of the ship's tackle, would such tender have been good, according to the custom of the port of New Orleans?

97 A. Not in my opinion. They would have to truck it to within the customary distance.

Q. Who would have to truck it?

A. Whoever was making the delivery.

Q. Then do you mean to say, Mr. Warriner, if cotton to be transported on one of your vessels had been brought by the railroad company to a point not within reach of the ships's tackle, that the officer of the ship would, if he followed the custom of the port of New Orleans in that respect, have refused to receipt for the same until it was brought within reach of the ship's tackle?

A. Yes, sir.

Q. Did you ever pay for the truckage or carriage of cotton from a point without the reach of the ship's tackle to a point within reach of the ship's tackle?

A. Not to my knowledge.

Defendant's counsel reads from the deposition of Mr. WARRINER as follows:

Direct examination by Mr. CLEVELAND:

Q. Did you ever send a vessel to Westwego for less than 2,000 bales?

A. We have taken less than 2,000 bales at Westwego, certainly. It might suit us sometimes to take less. If we were at Southport we might drop over to Westwego and take whatever they had and we did that, I think, in several instances.

Q. When you did go to Westwego for less than two thousand it was to suit your own convenience?

A. Yes, sir.

Cross-examination by Mr. TAGGART:

Q. Now then, you speak of delivery within reach of the ship's tackle, do you know how, actually, the cotton was deposited on the wharf at Westwego and received by the stevedore who went there, as a matter of fact?

98 A. Opposite the ship, on the wharf, where it could be reached by the longshoremen.

Q. Now, how far the cotton was actually placed from the ship you do not pretend to state, do you, here?

A. No, I do not pretend to say how far—within a reasonable distance of the ship's tackle.

Q. What sort of tackle was used in the loading of cotton at Westwego?

A. It was loaded with falls and slings. There is rolling by the longshoremen in order to sling it to get it on the ship.

Q. But when it is not immediately alongside the ship they either roll or truck it?

A. Sometimes they do not need to do it, just put it down and sling it to the falls, that is, the nearest cotton.

Q. But that which is farther off they either have to roll or truck?

A. They roll it, generally, until it is within that distance of the ship. But just how far back it may be put I cannot say; but he has nothing to do with it until it is placed within a reasonable distance, not until it comes within the proper limits.

Q. And in what way it is carried to that place you do not know; you only know that as a matter of inference?

A. I know we never paid any of this extra trucking.

Q. I did not ask you that. You paid a certain amount for loading the cotton?

A. Yes, sir.

Q. Now, what work was done in order to load that cotton at Westwego you are not able, as a matter of fact to state, are you?

A. Oh, no.

Q. Don't you remember that just before the fire there were labor troubles here in New Orleans—steamship labor—between the white and colored screwmen?

99 A. I do not remember the date, but I think it was after the fire that we had the labor troubles.

Q. Don't you remember that here in New Orleans, but not at Westwego, that the steamship companies had trouble with their longshoremen or screwmen?

A. After the fire, yes, sir. After the fire I think it was. I know we had some afterwards about December. That was here in New Orleans. There never was any trouble at Westwego that I know of except that our men would not work there; would not work anywhere; Mr. C. G. Miller was after us twice a day sometimes, about moving the cotton before the fire, and after the fire, too, many a time. Wanted to know when we were going to send for the cotton. That was before the fire, and after, too.

Q. After the building of the Westwego wharf, it was customary not only for your steamship line, but for all other steamship companies to call at Westwego and get cotton?

A. I suppose most of the lines did that. Most of the lines went there.

Q. And all export cotton which was required to be carried by rail came to the port of New Orleans, and all that by the Elder, Dempster line was delivered at Westwego, wasn't it, or substantially all, after this wharf was built, the cotton carried by the Texas and Pacific Railway Company?

A. I do not know. I think there was a good deal carried that was delivered to the city front in New Orleans, in the city.

Q. I am speaking about export cotton for the Elder, Dempster line?

A. I should say most of it was delivered at Westwego.

Q. But where there was a general contract for delivery at the port of New Orleans for cotton to be carried by the Elder, Dempster line, Westwego was the point of delivery, was it not?

A. Yes, sir.

100 Q. What freight was received there?

A. Well, they loaded staves, hard wood, and general cargo of all kinds. That was export freight also.

Q. Carried under an arrangement similar to that of the cotton, was it not?

A. Not generally.

Q. Was not specially provided for in advance, though?

A. No; not generally carried on a through basis such as cotton.

Q. How was it carried?

A. Local shippers would make the freight arrangements and it would be delivered to us at Westwego.

Q. In regard to these shipments other than cotton, let me get that clear, you say that is done by special arrangement, that delivered at Westwego by a special arrangement with the shippers?

A. Yes, sir.

Q. And the party may ship locally, as we call it, over the Texas and Pacific railway to the Westwego wharf?

A. I do not know how he gets it there.

Q. He gets it to Westwego, but not on a through bill of lading, such as this cotton is shipped under?

A. I don't know what arrangement he made as to delivery. The shipper makes the arrangement for the carriage of the freight, leaving the railroad out of the question. If he makes an arrangement with us to receive, we will say, so many car-loads, he gets the rate from the railroad to get it to Westwego, and we arrange to take it at Westwego, and the same with oil cake. In all those cases the shipper is exactly the same as the railroad. He takes the place of the agent just the same as the railroad and we take it from him at Westwego the same as we take it from the railroad. Just as though it was in reality the railroad. Just as though he manu-

101 factured it right alongside of the wharf and asked us to come and get it there.

Plaintiffs' counsel reads from the deposition of Mr. WARRINER as follows:

Redirect examination by Mr. CLEVELAND:

I say that under these shipments by local men, I understand that they are in exactly the same position in regard to Elder, Dempster & Company as the railroad company is under contract number 44. And that was during 1894 as well as it is today; a man contracts for our carriage and for delivery at Westwego the same as the railroad does.

Defendant's counsel reads from the *dis*position of Mr. WARRINER as follows:

Recross-examination by Mr. TAGGART:

Q. When he brings stuff to Westwego he gives you notice of its arrival?

A. When he brings his freight he then arranges it, and he is in a little better position than the railroad to arrange time shipments, instead of unrestricted delivery.

Q. That is, at a certain time he will have so many tons of oil cake at Westwego?

A. Yes, sir. He sends us word that he will have so many tons of oil cake over there and asks us if we will go over and take it; and when it is ready they notify us or we ask the shipper if the stuff is ready and then we go to Westwego for it; and if he does not produce it in the time mentioned he is in default and if we do not load it within that time, we are in default.

102 M. J. SANDERS, having been duly sworn, being examined by Mr. Cleveland as a witness on behalf of the plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am a ship agent at New Orleans. I was such in 1894. I represented the West India and Pacific Steamship Company in and prior to 1894. I had represented that company in New Orleans about ten years. Our regular wharf is at the foot of Celeste street in the city of New Orleans. We had no other dock in the port of New Orleans. We carried cotton. After the erection of this dock at Westwego cotton was delivered to us for transportation by the Texas and Pacific railroad at Westwego, as a rule. I couldn't state how much cotton was delivered to us at Westwego. I could not give you the exact quantity.

Q. During the season of 1893 and 1894 there was considerable cotton delivered to your line by the Texas and Pacific Company at your wharf?

A. That I cannot say without referring to my books, but I presume there was, the rule being that if they had over there at any one time, say 2,000 bales, we would go to Westwego for it, and if they had a small quantity which they wished us to take, perhaps part of an accumulation, say less than two or three thousand bales, it would be delivered at our wharf. I was familiar with the customs and usages existing in the port of New Orleans relative to the shipments of cotton from that place to foreign ports and was familiar with such customs and usages in 1893 and 1894.

Q. In November, 1894, did you have any contract or arrangement with the Texas and Pacific Railroad Company relative to the number of bales of cotton that would be delivered to your ships?

A. We had a general understanding that we would not
103 send the vessels to Westwego unless there was a certain quantity of cotton ready for delivery to us at one time; that quantity I believe was fixed at 1,500 to 3,000 bales, and we would not send our vessels for a smaller quantity than, say, 2,000 bales. If the railroad had less than 1,500 bales of cotton for transportation over our lines it would have been delivered to us in November, 1894, at our own wharf at the foot of Celeste street. Cotton was delivered on our wharf in New Orleans by the Texas and Pacific Railroad Company, I think, usually by dray. The railroad paid for the draying.

Defendant's counsel reads from the deposition of Mr. SANDERS as follows:

Cross-examination by Mr. TAGGART:

Q. You speak of an arrangement with the railway company for taking cotton at Westwego; that was an arrangement for booking cotton at a special rate per 100 pounds—a sea rate?

A. Yes, sir. These bookings were made from time to time and for different amounts. And after this wharf at Westwego was built those bookings continued just the same as before. And under those bookings at a rate of a certain number of cents per 100 pounds, sea rate, the railroad company would go into the interior and arrange with the shipper for a shipment at a certain through rate, as I understood it, which would be a combination of the railroad rate and our agreed sea rate. And the railroad agent would issue through bills of lading to the shipper.

Q. Now, after Westwego was opened, then cotton shipped in that way was shipped to Westwego and there received by the steamship lines, was it not?

A. As a rule, with the modification that I have already mentioned, that a certain quantity or number of bales must be there at one time for delivery.

Q. Was that ever embodied in any agreement with the rail-
104 road or was it simply a general statement by the steamship lines that it would not pay them to go there for less than about 2,000 bales?

A. I think, so far as my line is concerned, my understanding is that it was probably in writing. I think it was in writing. I would not be positive; I won't say that positively. I am not positive about the agreement being in writing, but I should be inclined to think now that it was. But I think that after the erection of the wharf at Westwego all cotton was loaded there; that is, all export cotton, so far as our lines were concerned. That is, the delivery of export cotton in the city of New Orleans, along the front, had about practically ceased. And in the season of 1894, after the season opened, the bookings would be made then for account of any of the main lines of steamships here in the city at any time I should think, and particularly during the months of October and November, when the shipments were very heavy, I have seen these through bills of lading which were issued from time to time. They were regularly issued

by the railway companies on behalf of the railroad and steamship companies together, covering both parties of the line, the ocean line and the rail line, and copies of them would go to the steamship line, and the railway part of the line was usually described as from the point of shipment to New Orleans, and the ocean or steamship part of the line was New Orleans to Liverpool or whatever port the cotton was destined for.

Q. And the point of delivery from the railway company to the steamship line, under that class of bills of lading, was always understood to be Westwego, was it not?

A. Yes, sir; under the modifications I have expressed.

Q. And that even where the bookings did not express that the point of delivery was at Westwego?

A. Yes, sir.

Q. There were other shipments from Westwego than cotton, were there not, that is, other articles were shipped from there besides cotton and grain?

105 A. Yes, sir; I think there were, though I am not sure that in 1894 shipments other than cotton or grain amounted to anything of moment.

Q. Were there not considerable shipments in oil, meal and cake?

A. Not over our line, I can't speak for the other lines.

Q. That is, your line handled principally grain and cotton, those articles constituted the principal part of shipments by your line?

A. Yes, sir.

Q. The grain wharf was practically part of the cotton wharf at Westwego?

A. There was a gangway on the front of the grain-carrier which connected with the cotton wharf, but it is not of sufficient width to enable any loading of cotton at the grain wharf. Our line of steamships runs regularly from New Orleans to Liverpool. In the winter season twice a week. Two steamers each week leaving New Orleans, not two leaving Liverpool. It is one of the largest lines leaving New Orleans.

L. C. FALLON, having been duly sworn, being examined by Mr. Cleveland as a witness on behalf of the plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am sixty years old, a coffee and commission merchant, and my residence is in New Orleans. I have been engaged in that business about thirty-eight years. I import some coffee—that is not the principal business I do in coffee, though. I am importing for myself and for others. I am familiar with the port of New Orleans.

Q. In November, 1894, did you consider Westwego as being

106 commercially within the port of New Orleans?

Objected to. Objection overruled. Exception by defendant.

A. Well, really I don't know whether Westwego is a part of the port of New Orleans today. I never would accept delivery of a cargo of coffee there. If a shipper of coffee was to send me a cargo of coffee for delivery at New Orleans and it was delivered at Westwego, I wouldn't consider it brought to the port of New Orleans. I never knew of the delivery of any goods consigned to the port of New Orleans at Westwego.

Defendant's counsel reads from the deposition of Mr. FALLON as follows:

Direct examination by Mr. CLEVELAND:

I am not very familiar with Westwego. I am not one of the largest importers in the city. I have been to Westwego a few times. I don't know when the dock of the Texas and Pacific Railway Company, which was burned in 1894, was built.

Q. Mr. Fallon, did you ever know a vessel to discharge or receive freight at Westwego?

A. Yes, receiving freight. I never had anything to do with the discharging of freight.

Q. When first did you know of a vessel receiving freight there?

A. For myself, I have shipped cross-ties—brought cross-ties up the railroad and had them brought and delivered at Westwego by contract.

Q. When first, to your knowledge, was any commercial business done there?

A. I don't know of any business but my own. I have had nothing to do with Westwego.

107 ALEXANDER HARRIS, having been duly sworn, being examined by Mr. Cleveland as a witness on behalf of the plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I was born in 1843, and am fifty-six years old, and have lived in New Orleans since I was four years old. I was, since 1882, a partner of Mr. Moulton, and since 1895 I have been the agent of the Cromwell Steamship Company. Prior to 1895, I was still in the same business—steamship agent. I am not familiar with Westwego, I never went over there. Our line of vessels handles cotton from New Orleans. Our wharf in New Orleans is at the foot of St. Louis street. We handled cotton in 1894. I have received thousands of bales of cotton over the Texas and Pacific Railway Company. Delivery was made at that time right at the switch at our landing. We received cotton in 1894 from the Texas and Pacific Railway Company.

Q. And it was delivered then at the same place?

A. Delivered in cars and we discharged the cars at our wharf.

Defendant's counsel reads from the deposition of Mr. HARRIS, as follows:

Cross-examination by Mr. TAGGART:

The Cromwell line of steamers, of which I was agent in 1894, runs regularly from New Orleans to New York. New York is the other terminus of the line. The cotton that was carried was destined for any place; for instance, Europe, or generally the Eastern mills. That cotton comes over the Texas and Pacific Railway Company under through bills.

Q. Under an arrangement for a division of the through rate?

108 A. Well, it is a pro rate, the steamship getting its division of the rate; that is, it is a through rate from the point of shipment to the New England mills. It does not come on a booking such as is made for cotton to Liverpool. It is a mere percentage of the through rate between the different railroads, and not as to quantity, and the Texas and Pacific Railway Company takes its proportion of that through rate and the Cromwell line takes its proportion; that comes in car-load lots to New Orleans, and is delivered to our line.

Q. Your line happens to be near a switch of the Texas and Pacific Railway Company?

A. The switch is more of a Louisville and Nashville railroad switch, and the Texas and Pacific make delivery in there, and it comes down over that switch direct to us, the Louisville and Nashville make such switching down to our dock. They got so much a pound, and the switch charge, whatever the through rate may be, is based upon the number of cars handled. It is an arbitrary switching charge. That switch brings the car down to our dock, and delivery is made there, so far as our line is concerned. Our line did not, neither in the case of the Texas and Pacific or the other railway companies, go to their docks to get the cotton. In the case of all the other cotton delivered from other railways it was through a switching arrangement, similar to this, and brought to our wharf by floats or by drays.

Q. So that you know nothing about foreign export cotton and like things handled in New Orleans, and you handle none of that except as it may happen to come to New Orleans and be reshipped over your line?

A. That is all.

109 JOHN G. WOODS, having been duly sworn, being examined by Mr. Cleveland as a witness on behalf of the plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

My business has been that of commission merchant for the past ten or eleven years, engaged exclusively in the Central American fruit trade. The company with which I have been connected has been handling steamers constantly in the Central American trade.

I am familiar with the importing business in New Orleans from Central America.

Q. As a merchant connected with the importing business in New Orleans, would you say that in 1894 Westwego was considered, commercially speaking, within the port of New Orleans, within the port of entry of New Orleans?

Objected to. Objection overruled. Exception by defendant.

A. No, I would not.

Defendant's counsel reads from the deposition of Mr. Woods, as follows:

Direct examination by Mr. CLEVELAND:

Q. Have you been to Westwego, where the docks of the Texas and Pacific Railway Company are?

A. Personally, I have never been at Westwego.

Cross-examination by Mr. TAGGART:

Q. Mr. Woods, you are considering this question from the standpoint of your particular business, the fruit business, are you, and the receipt and delivery of fruit? You don't know anything about the business at Westwego in respect to other lines for importation or exportation, do you?

110 A. No, sir; I am entirely unfamiliar with Westwego.

GEORGE R. WESTFELDT, having been duly sworn, being examined by Mr. Cleveland as a witness on behalf of the plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am forty-eight years of age, and reside in New Orleans, and am a coffee merchant. I am familiar with the port of New Orleans for coffee purposes. In 1894 I did not consider Westwego as commercially within the port of New Orleans for coffee purposes.

WILLIAM P. ROSS, being sworn and examined as a witness on behalf of the plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Redirect examination by Mr. CLEVELAND:

I am a steamship agent. I have been such in the city of New Orleans twenty-five years. In November, 1894, I was a member of the firm of Ross, Howe & Merrow, and we handled a large number of steamers, mostly on what they call the "tramp" order. I recollect the labor troubles that existed in New Orleans in October and November, 1894.

Q. Will you give me some account of them, their origin, cause, extent, &c.?

A. They originated in a dispute between the white and colored screwmen, by which the white screwmen boycotted the colored men, or rather, boycotted any employers who employed colored labor, and it reached a very serious condition of affairs, where business was entirely upset and a great deal of business driven away. There was a great deal of rioting and trouble. I recollect the time of
111 the burning at Westwego. Those labor troubles continued off and on during the whole of the winter, from say October. I recollect the burning of the West India docks.

Q. At that time what was the condition of the labor trouble?

A. Well, I don't know that I can explain it further than to say that there was a very considerable feeling of unrest, uncertainty and a fear of what was going to happen.

Q. In 1893 and 1894 where were the terminals of your line?

A. We usually loaded our ships at Sixth street in the city of New Orleans. This was prior to 1894 also. We did not have any other dock in the port of New Orleans that was specially assigned to us. These lines were engaged in carrying all kinds of goods to various ports in Europe. We carried cotton. I am familiar with Westwego, but I have not been there recently. I was familiar with the customs and usages existing at New Orleans relative to the shipments of cotton from that place to foreign ports. I never did much business there, but I am familiar with what is the usage in that respect, and I was familiar with those customs in 1893 and 1894.

Q. At the time of the fire was Westwego commercially the same as the port of New Orleans?

A. Now, I don't recollect the time that it was brought in by act of Congress. It was not so considered before that act was passed, only by courtesy and agreement. Agreement between the railroad and the ship, or the shipper and the ship.

Q. In 1893 and 1894, under what circumstances do you know of any vessel going to Westwego to receive cotton?

A. Well, I can only speak of my own ships. I went there very little, and then only by special agreement either with the railroad or the shipper. That agreement was that we would go to
112 Westwego for a certain amount of cotton at a certain time. We would not go there for any amount that was there. We would have special contracts for certain amounts. We would agree for a certain minimum amount that we would go there at certain times. The minimum amount for which I would go to Westwego, according to my recollection, was probably in the neighborhood of two thousand bales—something of that sort.

Q. In 1893 and 1894, do you say that you would not send your vessels to Westwego for less than two thousand bales?

A. That is my recollection of it, as to the amount that we stipulated as the minimum for any one ship.

Q. Did you ever know of a vessel going to Westwego to load cargo without having made some special arrangement with the railroad company?

A. No, sir; none of my ships.

Q. In 1893 and 1894, if the Texas and Pacific had offered you for

transportation on a vessel of your line less than two thousand bales of cotton, where, by the custom of the port of New Orleans, would such cotton have been received by you?

A. Unless we had made an agreement to go to Westwego, they would have had to deliver it at our regular wharves.

Q. How was cotton delivered at your wharf in New Orleans; by drays or by the freight lines?

Objected to as immaterial. Objection overruled. Exception by defendant.

A. It was delivered by the shipper or the railroad. I never paid for such transportation to my recollection.

Q. How was cotton received by you for transportation on your ships, on docks other than your own?

A. Well, if we were crowded at our own wharves, we might arrange to load ships at some other wharf and then we would receive it in the same manner.

113 Q. Please state whether or not such cotton was required to be placed at any particular point before it could be receipted for by the officer of the ship whose duty it was to receive it.

A. Had to be placed abreast of the ship—at the edge of the wharf. It is commonly called within reach of the ship's tackle, and that is what is usually meant in that clause of the article. Within reach of the ship's tackle means literally that it must be where the ship's falls can reach it, but it is modified by custom, especially in the case of cotton.

Q. How was delivery of cotton made, as to the length from the ship?

A. Has to be abreast of her, that is, if the ship is three hundred feet long it is within that three hundred feet and [illegible]e outer edge of the wharf. The drays back up and it is dumped onto the woodwork of the wharf. Those wharves run from seventy to one hundred feet wide.

Q. Mr. Ross, if cotton tendered to a ship of your line at a dock other than the dock of your line, had not been within reach of the ship's tackle, would such tender have been good according to the custom of the port of New Orleans?

A. Not unless by agreement.

Q. Then, do you mean to say, that in the absence of an agreement, if this cotton, which was to be transported in your ship, had been brought by the railroad company to a point not within reach of the ship's tackle, that the officer of the ship, if he followed the custom of the port in that respect, would refuse to receive it until it was brought within reach of the ship's tackle?

A. Yes, sir.

Q. Have you ever paid for the truckage or carriage of cotton from a point not within the reach of the ship's tackle to a point within reach of the ship's tackle?

A. I may have done so under some special agreement.

Q. But irrespective of any special agreement?

114 A. I don't remember.

Defendant's counsel reads from the deposition of Mr. Ross as follows:

Cross-examination by Mr. TAGGART:

In 1894 we represented the French line, I believe the Anchor line; most of the rest of the business was "tramp" business. Some of these lines were running steamers regularly, and some were running occasionally, as business demanded. I had no cotton on the wharf at Westwego destined for any of my lines at the time of the fire. I don't think I had any engagements for cotton with the Texas and Pacific railway outstanding at the time of the fire.

Q. You speak of special arrangements with the railroad company for delivery at Westwego; do you mean an arrangement such as has been testified to here, by which there would be an engagement for a stipulated number of bales of cotton at a certain sea rate, and the railroad company would thereupon go into the interior and arrange with shippers for the shipment of that cotton over their own lines, and over the steamship lines with which the sea rate was made?

A. I mean the railroad would make a contract with the steamship agent, just exactly as any shipper would do, for the carriage of a certain amount of cotton on the terms specified in that contract. That was the special arrangement I referred to. A part of that special arrangement would be that we should go to Westwego to take such freight.

Q. Don't you know that under those steamship contracts, when they would speak of a sea rate, we would say, of forty-nine cents a hundred pounds from New Orleans to Liverpool, that it was the general custom, without specifically mentioning Westwego in the contract, for the steamships to receive that cotton at Westwego?

A. Most positively no.

Q. You don't know?

115 A. Most positively not.

Q. You say in your case Westwego was always named as the place of delivery if it was the place of delivery?

A. I say when we went to Westwego we did so under a special arrangement to go there and not otherwise.

Q. Then, if no place was named in the contract fixing the sea rate, Westwego would not be the point of delivery, according to your understanding?

A. Not without a special agreement; no, sir.

Q. That special agreement as to delivery, do you know whether that was expressed in these contracts respecting the sea rate or not?

A. I don't know what was done with other agents, but in my office it was always expressed. I did very little business with the Texas and Pacific.

Q. You don't know how it was with the other steamship companies which did the bulk of the business?

A. I don't know how they managed the business. I know, however, that a large amount of export cotton, after the wharf at Westwego was built, was delivered to the steamship lines at Westwego.

Q. And that the delivery of export cotton at any other point by the Texas and Pacific had almost entirely ceased, had it not?

A. As far as direct arrangement between the railroad and ships are concerned.

Q. As far as you know, the delivery of export cotton by the Texas and Pacific railway at any point other than Westwego had largely ceased, had it not?

A. As far as any direct engagement with the Texas and Pacific Company on through bills of lading it did, but it did not cease as far as other export cotton was concerned.

Q. That is, export cotton, originating at New Orleans, local shipments, it did not cease?

116 A. Coming from the Texas and Pacific railroad. That would be what they call F. O. B. cotton. But so far as other cotton was concerned, the delivery would have been at Westwego, as I understood it.

Q. But cotton on other bills of lading, embodying the inland or rail rates or the ocean or steamship rates was largely delivered, if not entirely so, at Westwego, if there was no other stipulation in making the agreement?

A. Yes, sir.

Q. Well, do you know that they made an express stipulation in any agreement, without first having the steamship rate?

A. I can't say what was done in that respect.

Q. But you made the stipulation in that regard in your own case?

A. Yes, sir; I don't know as to others, naturally. I don't remember going to Westwego for anything other than cotton, except by special agreement.

Q. But you did make large shipments of other things than cotton?

A. Oh, yes, we had a ship up there just finished at the time of the fire. We were shipping oil cake on her. That was a shipment made by a local party here. That is, a local shipper had arranged for our ship to call at Westwego and take the freight. That was our point of reception for that freight. It was not on a through bill of lading issued originally by the Texas and Pacific Railroad Company. We were accustomed to call there for staves too, whenever the amount was sufficient and it suited us to do so. Our arrangement for the shipment of this oil cake was an arrangement made with the shipper. He told us that he had a certain quantity over there—told us what the quantity was, and we agreed to call at Westwego for it at a certain rate per one hundred pounds, or ton, for Liverpool, or wherever it was destined for. That's all the arrangement I made about taking that shipment, and all I was required to

117 make, and when I learned it was there ready for shipment I sent the steamship over there for it and got it. Of course, we had to see that the wharf was clear; we were in communication with them by telephone. That was the extent of the arrangement I made, and all I had to do was to ascertain whether there was a place there at which the ship could load.

S. V. FORNARIS, having been duly sworn, being examined by Mr. Cleveland as a witness on behalf of the plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I live in New Orleans. I am president of the Union national bank and steamship agent.

Q. What steamship company?

A. The French line. Our firm name is S. V. Fornaris & Co. That firm has been in existence about eighteen years, in New Orleans. I have been a member of the firm all that time. I was in that business in 1893 and 1894. I have always represented that line since they came to New Orleans. At first it was the Commercial line.

Q. Have you any particular terminals at New Orleans—wharves or docks for your line?

A. Yes, sir; at the foot of St. Andrews and St. Mary streets; it was there in 1894. It was there since 1884 or 1885, I don't know exactly how long. We have no other dock in New Orleans beside that. That line was engaged in carrying freight from New Orleans to Havre, especially—cotton, oil cake and the products of cotton, meal, grain and general freight. In 1894 our line received freight or cotton at other docks than our own. We went to take freight from other docks. The steamers went to Southport and went to Westwego in 1894. I think I am familiar with the customs and usages existing in the port of New Orleans as to the shipment of
118 cotton to various ports in Europe. I was familiar with such usages and customs in 1894.

Q. Under what condition, if any, Mr. Fornaris, did your vessels go to Westwego?

A. Whenever there was a sufficient quantity of freight to justify my sending a vessel over there.

Q. Well, what quantity of cotton in 1894 justified your sending a vessel over there?

A. Nothing less than one thousand bales. If the Texas and Pacific had less than one thousand bales to ship on our line in 1894, delivery would have been made to us at our wharf on the New Orleans side of the river. I mean that in 1893 and 1894 I would not send a vessel to Westwego for less than one thousand bales of cotton.

Defendant's counsel reads from the deposition of Mr. FORNARIS as follows:

Cross-examination by Mr. TAGGART:

Q. Mr. Fornaris, did you have any bookings of export cotton with the Texas and Pacific railroad which is involved in the suit pending in New York?

A. I don't know if I have any in that suit. I don't know which is the cotton involved in that suit. I had some bookings for the Texas and Pacific outstanding at the time of the fire. I don't know whether it was the cotton involved in the New York suits. This

booking of cotton was export cotton for Havre. I suppose the railroad company went into Texas and engaged from the shipper, based on our ocean rate and the rail rate from there to New Orleans. I suppose that's the way the business was done. I received that at Westwego.

Q. Under those bookings, that was the understanding, was it not, after the wharf at Westwego was built?

A. Yes, sir, whenever we went to Westwego to take cotton—spot cotton—but I can't remember positively about this, because I thought the steamship was here, on this side, and the cotton
119 was to be delivered to my wharf here, and yet it was burned on the other side.

Q. You do not know whether that cotton was involved in these suits in New York?

A. I know it was cotton destined to the Canaries to be delivered on this side of the river, and the cotton was burned at Westwego.

Q. That was a special arrangement as to point of delivery?

A. Yes, sir, and the point of delivery was at my wharf. I don't remember who shipped the cotton.

Q. Do you know the amount of cotton?

A. A few bales, not many. At the time of the fire I don't know what the entire amount of bookings I had with the Texas and Pacific was. I don't know whether there was any more cotton for my ship or not. Our line was accustomed to go to Westwego, as well as to other wharves where freight was to be delivered, where it could get freight, whenever there was a sufficient quantity to justify our going there. Under a previous arrangement with the Texas and Pacific we made an engagement with them that if they had so many bales we would go there to take them. But I only made this arrangement to go there under those circumstances; and if there was not enough to justify me I would not send a ship there. I would not send a ship anywhere for ten bales of cotton. There had to be a sufficient amount of cotton to justify me in sending for it. That was true at Westwego, Southport on this side, Algiers or anywhere.

(Plaintiff rests.)

Mr. CLEVELAND: We ask your honor for the direction of a verdict for the plaintiffs for the amount that Mr. Mygatt stated.

Mr. TAGGART: We ask the privilege of going to the jury
120 on two questions in this case; one is on the question of fact that under this bill of lading, under the facts shown, this property was awaiting further conveyance, and that we are only liable as warehousemen, and that if they find in our favor on that proposition and on the other question on the third clause in the bill, we ask to go to the jury on the question that this property was ready for delivery to the next carrier or the consignee. Under the facts shown in the testimony and under the authority and principle of the decision in Constable *vs.* Steamship Co., 154 U. S., we insist that we are entitled to go to the jury on those two questions. I have not read the testimony to the jury, reserving that until the decision on this application. If the decision is favorable I should read the tes-

timony, and would then present the considerations, which I insist I am entitled to, to the jury, and point out the testimony which bears upon these contentions.

The COURT: In view of the decision of the circuit court of appeals I shall deny both the applications to go to the jury, and give an exception to the defendant, and grant the motion of the plaintiffs to direct a verdict in their favor, giving again an exception to the defendant.

Direction of Verdict.

The COURT: Gentlemen of the jury, this case has once been tried and appealed, and is now back on a new trial after the appeal. The circuit court of appeals has settled all the law in the case, and the facts, therefore, you have not been burdened with. Under the law as it is settled by the circuit court of appeals, the facts which have been read in evidence here entitle the plaintiff- to a judgment to the amount of $6,705.38, and for that sum you will render your verdict.

Verdict.

By direction of the court, for the plaintiff-, in the sum of $6,705.38.

121 E. H. L., JANUARY 2, 1900. PLAINTIFFS' EXHIBIT A.

(See *ante*, p. 2.)

United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES Anderson Earle
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

DE FOUBLANQUE PENNEFATHER
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

ARTHUR BOWER FORWOOD, ERNEST HARRISON FORWOOD, and Harold Stanley Forwood
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

122 PHILIPP CORNELIUS HEINEKEN and JOHANNES VOGELSANG
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

And 39 Other Cases.

It is hereby stipulated between the parties hereto—

First. That the bills of lading which are marked R. T. and T. C., March 23rd, 1897, were, on the day of their respective dates, duly issued and delivered by the defendant to the shippers therein named, at the place therein stated as the place of dates.

Second. For the purposes of arriving at the value at the place of shipment, at the date of the bill of lading, of any of the cotton included in any of the forty-three (43) actions pending in this court against the Texas and Pacific Railway Company, arising out of the fire at Westwego on November 12, 1894,

The weight given on each of the bills of lading as the aggregate weight of all the bales of cotton therein stated to have been shipped shall be divided by the number of bales of cotton therein stated to have been shipped, and the result shall be taken as the weight per bale. In case of a total loss of the cotton described in the original invoices, in possession of the plaintiffs' attorneys, the grades shall be taken to be as described in said invoices, and the value of said grades of cotton shall be determined as hereinafter set forth.

In case a portion only of the cotton in any invoice shall have been destroyed, and it is not possible to definitely identify the particular bales of cotton destroyed, then the cotton destroyed
123 shall be considered to be the lowest grade shown on the invoice on which such destroyed cotton appears.

The prices, per pound, of such grades shall be the New Orleans price current at the date of the bill of lading for such grades of cotton, less the amount of rail freight from shipping point to New Orleans, fixed and agreed for this purpose at seventy-five (75) cents per hundred pounds, such New Orleans price current to be fixed by the secretary of the cotton exchange at New Orleans, or by the secretary of the cotton exchange at New York.

Third. That plaintiffs' attorneys shall furnish to defendant's attorneys copies of the invoices covering the four cases now on the calendar, on or before the 31st of March, and copies of invoices covering the remainder of the suits within a seasonable time thereafter, and at least four weeks before any of said cases shall be moved for trial.

Fourth. The trial of these cases shall be set for the second Monday of April, 1897, provided that the adjournment of the trial of the cases beyond the day when they are first called for trial shall not interfere with their trial on such second Monday of April, 1897.

Dated New Orleans, March 23rd, 1897.

EVARTS, CHOATE & BEAMAN,
Plaintiffs' Attorneys.

RUSH TAGGART,
Attorney for Defendants.

124 E. H. L., JANUARY 2, 1900. PLAINTIFFS' EXHIBIT B.

(See *ante*, p. 2.)

Copy.

Export bill of lading, approved by the permanent committee on uniform bill of lading, to take effect July 1, 1893.

Form 3038 Rev.

The Missouri, Kansas & Texas Railway Company of Texas, and Texas Pacific R. R., and Elder, Dempster & Co. S. S. line.
(Name of fast freight line or railroad.) (Steamship or steamship line.)

Export bill lading No. F 43.
Contract, M., K. & T., No. 609.
T. & P., No. 69.

The M., K. and T., Missouri, Kansas & Texas R'y.

Received at Temple, Tex., from A. Norden & Co., the following property, in apparent good order, except as noted (contents and conditions of contents of packages unknown), marked, consigned and destined as indicated below:

This space must be reserved for use of agents at the seaboard.

Through rate—gold—per.....		£.....
Ship's proportion.....		£.....
Inland charges.....	£.....	.....
Advance charges.....	£.....	£.....
Total		£.....

Marks and numbers.

S 14 X.....	100
POCJ	100
NORDEN.	

125 *Articles.*

Two hundred bales of cotton.
Weight 100,071 lbs. (subject to correction).

To be carried to the port of New Orleans, La., and thence by Elder, Dempster & Co. S. S. line to the port of Bremen, Germany (or so near thereto as ship may safely get, with liberty to call at any usual port of call), and to be there delivered unto order Howard & Hotzen, or to their assigns (notify —— ——), or to another carrier on the route to destination if beyond said port, upon payment immediately on discharge of the property, of the freight thereon, at the rate from Temple, Texas, to Bremen, Germany, of one hundred eighteen cents, United States gold currency, per one hundred pounds gross weight and advanced charges, (8—), with all other charges and

average, without any allowance of credit or discount; one pound sterling to be considered equal to $4.80 United States gold currency. Settlement, if in currency other than sterling, to be at current rates of valuation.

In consideration of the rate of freight herein named, it is hereby stipulated that the service to be performed hereunder shall be subject to the conditions, whether printed or written, herein contained, and said conditions are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable.

Conditions.

With respect to the service until delivery at the port of New Orleans, La., it is agreed that:

1. No carrier or party in possession of all or any of the property herein described, shall be liable for any loss thereof or damages thereto, by causes beyond its control; or by floods; or by riots, quarantine, strikes or stoppage of labor; or by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet or decay; or from any cause if it be necessary or is usual to carry such property upon open cars.

2. No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable despatch as its general business will
126 permit. Every carrier shall have the right, in case of necessity, to forward said property by a railroad or route between the point of shipment and the point to which the rate is given.

3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event.

4. All property shall be subject to necessary cooperage and bailing at owner's cost. Each carrier over whose route cotton is to be carried hereunder, shall have the privilege, at its own cost, of compressing the same for greater convenience in handling and forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. No carrier shall be liable for differences in weights or for shrinkage of any grain or seed carried in bulk.

5. Property not removed by the person or party entitled to receive it within twenty-four hours after its arrival at destination, may be

kept in the car, depot or place of delivery of the carrier, at the sole risk of the owner of said property, and there held subject to the lien for all freight and other charges. Property taken from a station at which there is no regularly appointed agent, shall be entirely at risk of owner until loaded into cars; and when received from private or other sidings, shall be at owner's risk until the cars are attached to trains.

6. No carrier hereunder will carry, or be liable in any way for, any documents, specie or for any article of extraordinary value not specifically rated in the published classifications, unless a special agreement to do so, and a stipulated value of the articles are indorsed hereon.

7. Every party, whether principal or agent, shipping inflammable, explosive, or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

8. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading shall be void.

9. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped, and at the rates and under the rules provided for by published classifications.

10. If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the further condition, that no carrier or party shall be liable for any loss or damage resulting from the perils of the lakes,
127 sea or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances; or from collision, stranding, or other accidents of navigation; or from the prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have liberty to call at intermediate ports; to tow and be towed; and to assist vessels in distress, and to deviate for the purpose of saving life or property.

11. No carrier shall be liable for delay, nor in any other respect than as warehousemen, while the said property awaits further conveyance, and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer, of the ocean line above stated, leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer.

12. This contract is executed and accomplished, and all liability hereunder terminates on the delivery of the said property to the steamship, her master, agent or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien due and payable by the steamship company.

With respect to the service after delivery at the port of New Orleans, La., it is agreed that:

The ship shall have liberty to sail with or without pilots; that the carrier shall have liberty to convey goods in lighters to and from the ship at the risk of the owners of the goods; and, in case the ship shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to transship the goods to their destination by any other steamship; that the carrier shall not be liable for loss or damage occasioned by fire from any cause or wheresoever occurring; by barratry of the master or crew; by robbers; by arrest and restraint of princes, rulers, or people, riots, strikes, or stoppage of labor; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances; by heating, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for land damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk, or transshipment; nor for any loss or damage caused by the prolongation of the voyage, and that the carrier shall not be concluded as to correctness of statements herein of weight, quality, contents and value. General average payable according to York-Antwerp rules, 1890.

It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exemptions from liability contained in, the act of Congress of the United States, approved on the 13th day of February, 1893.

I. It is also mutually agreed that the carrier shall not be liable for articles comprised in section 4281 of the Revised Statutes of the United States, unless notice of true character and value thereof is given and same is entered in the bill of lading.

II. Also, that shippers shall be liable for any loss or damage to ship or cargo caused by inflammable, explosive or dangerous
128 goods shipped without full disclosure of their nature, whether such shipper be principal or agent; and such goods may be thrown overboard or destroyed at any time without compensation.

III. Also, that the carrier shall have a lien on the goods for all freights, primages and charges, and also for all fines or damages which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking, numbering, or addressing of packages or description of their contents.

IV. Also, that in case the ship shall be prevented from reaching her destination by quarantine, the carrier may discharge the goods into any depot or lazaretto, and such discharge shall be deemed a final delivery under this contract, and all the expenses thereby incurred on the goods shall be a lien thereon.

V. Also, that the ship may commence discharge immediately on arrival, and discharge continuously, the collector of the port being hereby authorized to grant a general order for discharge immediately on arrival, and if the goods be not taken by the consignee within such time as is provided by the regulations of the port of dis-

charge, they may be stored by the carrier at the expense and risk of their owners.

VI. Also, that full freight is payable on damaged or unsound goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

VII. Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

VIII. Also, that in the event of claims for short delivery when the ship reaches her destination, the price shall be the market price at the port of destination on the day of the ship's entry at the custom-house, less all charges saved.

IX. Also, that merchandise on wharf awaiting shipment or delivery be at shipper's risk of loss or damage by fire or flood, not happening through the fault or negligence of the owner, master, agent or manager of the vessel.

X. Also, that this bill of lading duly endorsed be given up to the ship's consignee in exchange for delivery order.

XI. Also, that the freight prepaid will not be returned, goods lost or not lost.

XII. Also, that parcels for different consignees collected or made up in single packages addressed to one consignee pay full freight on each parcel.

XIII. Also, that freight payable on weight is to be paid on gross weight landed from ocean steamship, unless otherwise agreed to or herein otherwise provided, or unless the carrier elects to take the freight on the bill of lading weight.

XIV. Also, it is stipulated that in case the whole or any part of the article specified herein be prevented by *an* any cause from going in the first steamship leaving after the arrival of such articles at said port, the carrier is only bound to forward them by succeeding steamships employed in this line, or if deemed necessary by said carrier it may forward them in other steamships.

129 XV. Also, that the property covered by this bill of lading is subject to all conditions expressed in the approved forms of bills of lading in use by the steamship company at time of shipment, and to all local rules and regulations at port of destination not expressly provided for by the clauses herein.

And finally, in accepting this bill of lading, the shipper, owner and consignee of the goods, and the holder of the bill of lading, agree to be bound by all its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder.

In witness whereof the agent signing on behalf of the said Missouri, Kansas & Texas Railway Co., of Texas, and of the Ocean Steamship Company, or ocean steamer and her owner, severally and not jointly, hath affirmed to three bills of lading, all of this tenor and date, one of which bills being accomplished the others to stand void.

Dated at Temple, Texas, this 30th day of October, 1894.

W. E. WERTHEISER,

Agent on Behalf of Carriers, Severally, but Not Jointly.

Endorsed.

Howard & Hotzen.
Delivered to Messrs. Reiss Bros.,
Liverpool or order.
Per pro Reiss Bros. R. T.
Alec. Reiss. T. C., March 23, 1897.

130 E. H. L., JANUARY 2, 1900. PLAINTIFFS' EXHIBIT C.

(See *ante*, p. 2.)

United States Circuit Court, Southern District of New York.

JOHN R. CALLENDER, OTTO MAGNUS, and HENRY C. HOLDER *against* THE TEXAS AND PACIFIC RAILWAY COMPANY. } Action No. 2.

And thirty-two other cases.

It is hereby stipulated between the parties hereto:

First. That the defendant does not and will not raise any question as to the jurisdiction of the court herein, and that no evidence need be offered by the plaintiffs on the subject of jurisdiction or as proof of the allegations contained in paragraph numbered "first" of the complaint in the above-entitled actions and proof on the subject of jurisdiction and of said paragraph is hereby waived.

Second. That the New Orleans prices current per pound for the grades of cotton covered by the bills of lading in this action at the date of said bills and as fixed by the superintendent of the New York cotton exchange are as set forth in Schedule A hereunto annexed.

Third. That the testimony of Edward L. Sargent taken on
131 behalf of the defendant in the action brought by John Henry Clayton and others against this defendant may be read in evidence, on behalf of said defendant, from the stenographer's minutes of a trial of that action, and shall be taken to be the evidence of said Edward L. Sargent, subject, however, to all objections that may be made thereto.

Dated New York, January 3, 1899.

EVARTS, CHOATE & BEAMAN,
Attorneys for Plaintiffs.
RUSH TAGGART,
Attorney for Defendants.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

SCHEDULE A.

1894.		Mid.	Fully mid.	Good mid.	Fully G. mid.
					6 3/16
Oct.	2.			9 1/8	6 3/8
	6.			6 1/8	6 3/8
	8.	5 3/4			
	9.	5 11/16	5 7/8		
	10.		5 13/16	6	
	11.	5 9/16	5 3/4	5 15/16	6 3/16
	12.	5 7/16	5 5/8	5 13/16	6 1/16
	13.		5 5/8	5 13/16	6 1/16
	15.		5 5/8	5 13/16	6 1/16
	16.			5 13/16	6 1/16
	17.			5 13/16	
	18.		5 9/16	5 3/4	6
	19.		5 9/16	5 3/4	6
	20.			5 11/16	5 15/16
	22.	5 1/4	5 7/16	5 5/8	5 7/8
	23.		5 15/32	5 5/8	
	24.		5 15/32	5 5/8	
	25.	5 5/16		5 5/8	
	26.			5 9/16	
	27.		5 13/32	5 9/16	
	29.		5 13/32		
	30.	5 1/4	5 13/32	5 9/16	
	31.		5 11/32		
Nov.	1.		5 11/32		
	2.			5 1/2	
	7.			5 7/16	

For staple 1/8 to 1/4 add 1/4c. per pound.

(Here follows map marked p. 132.)

133 E. H. L., JANUARY 2D, 1900. PLAINTIFFS' EXHIBIT E.

(See *ante*, p. 2.)

Invoice of 200 bales cotton shipped by A. Norden & Co., New York, per M., K. & T. R'y, from Temple, Tex., to New Orleans; thence, per Elder, Dempster & Co. S. S. line, to Bremen, by order and for account and risk of Mess. Reiss Bros., Liverpool.

Limit, $3\frac{3}{16}$d. (gm.), $3\frac{3}{16}$d. (m.), cif., & 6 %; freight, $1.18 per 100 lbs.; against sale or order, Oct. 24, '94.

Simon Stephen.

Counter-mark
Norden.

S. 14 X.	100 B. C, good mid'g	55,337 @ $3\frac{3}{16}$d....	£734	18	11
P. O. C. J.	100 " mdg.	54,734 " $3\frac{3}{16}$d....	" 698	8	7
	Knoll.				
	250 B. C.	110,071 lbs.	£1,433	7	6
	6 %		" 86	0	1
			£1,347	7	5
	Less freight, 110,071 lbs. @ 59d. net per 100 lbs.		" 270	11	10
			£1,076	15	7

From Ward & Hotzen, Temple, Tex.
Due 17th January, 1895.
Ullrichs.
Sample No.
664
665 } 666

Reimbursement, by our 60 d's draft on Mess. Reiss Bros., Manchester.
No. 8301. £1,076 15 7.
E. & O. E. New York, 5 Nov. 1894.
Ac. sale p. 65.
Amer.
Marine insurance is effected in Ince. Co. of North Amca., for £14 15 as per certificate attached to draft.

C.

This insurance covers all the risk after discharge at port of destination until warehoused, or if not warehoused, until delivery at the destination in the interior.

(Here follow diagrams marked pp. 134 to 140, inclusive.)

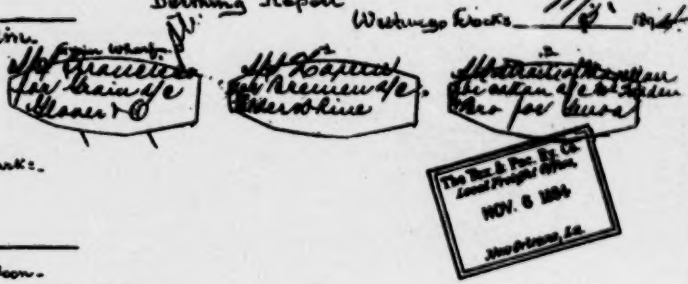
E. H. L. January 2nd, 1900. Plaintiffs' Exhibit G.

(See ante, p. 15.)

Berthing Report

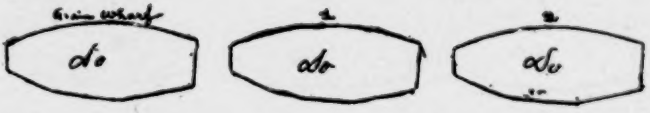
Westwego Docks 11/2 1899

At 7 am.



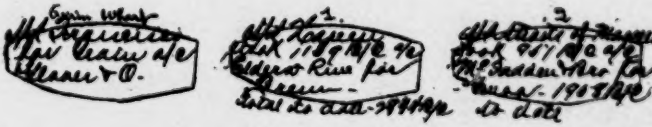
Remarks.

At 12 Noon.



Remarks

At 6 PM



Remarks.

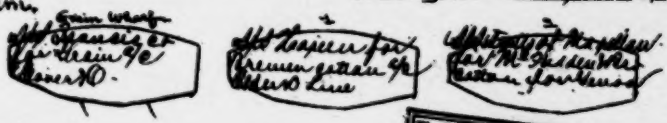
O. J. Miller

Freight Agent T&P

E. H. L. January 2nd 1900. Plaintiffs' Exhibit G 1.
(See *ante*, p. 15.)

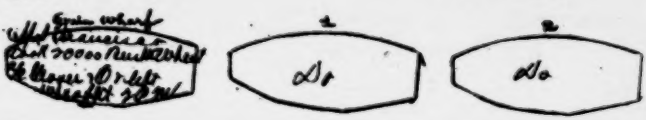
Berthing Report Wetmore Docks 11/6 1894

At 7 am.



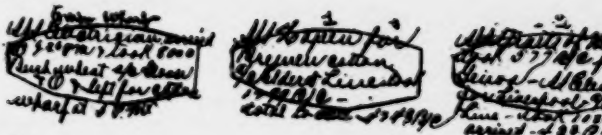
Remarks.

At 12 Noon.



Remarks.

At 6 PM



Remarks.

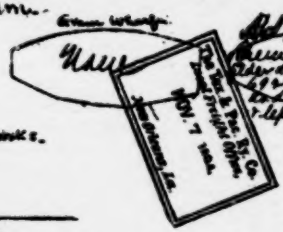
O. J. Millis
Freight Agent

E. H. L. January 2nd, 1900. Plaintiffs' Exhibit G 2.

(See *ante*, p. 15.)

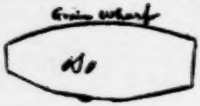
Berthing Report Wellington Docks 11/9 1899

At 7 am.



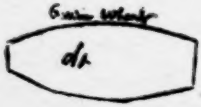
Remarks.

At 12 Noon.



Remarks.

At 6 PM



Remarks.

O. H. Willis

Freight Agent

E. H. L. January 2nd, 1900. Plaintiffs' Exhibit G 3.

(See *ante*, p. 15.)

Berthing Report Wharf Clerk's Books 11/9 1899

At 7 am.

From Wharf

1 — Name

2 — Ill Mallahan for Lake a/c Heinlard & Co

3 — Ill Patterson for Lighthall & Co a/c The American Line

Remarks.

The Tex. & Pac. Ry. Co. Local Freight Office, NOV. 9 1899

At 12 Noon.

From wharf

1 — Ill Gallagher arrived at 8.00 am for Lake a/c Heinlard & Co

2 — Ill Mallahan drafted back to Lake at 5 P.M. could not finish

3 — Ill Patterson left 547 N/E for Lighthall a/c American Line & left at 12 M

Remarks

At 6 PM

From Wharf

1 — Ill Gallagher left 2000 Remained a/c Heinlard & Co left at 1.30 PM

2 — Name

3 — Name

Ill Mallahan arrived at 2 PM left 1500 lbs a/c Heinlard & Co

Remarks

Pltff's G 4.

O. G. Meiers

Freight Accountant

E. H. L. January 2nd. 1900. Plaintiffs' Exhibit G 4.

(See *ante*, p 15.)

Berthing Report

Weitzugo Docks 11/8 1899

At 7am.

Name

The Texas & Pac. Ry Co. Local Freight Office NOV 8 1899 New Orleans, La.

Remarks.

At 12 Noon.

do

Name

Remarks.

At 6 PM

do

Remarks.

Off Miller

Freight Agent

E. H. L. January 2nd, 1900. Plaintiffs' Exhibit G 5.

(See *ante*, p. 15.)

Berthing Report Wellsingo Docks 11/10 1894

At 7am.

Grain Wharf — None

1 — Mst Maitland for Cd Oake c/o Mumbardt & Co

2 — Mst Ethenfeld by Cl Rendal c/o Mumbardt & Co

The Tex & Pac. Ry. Co. Local Freight Office, NOV. 11 1894 New Orleans, La.

Remarks.

At 12 Noon.

Grain wharf — do

1 — do

2 — do

Remarks.

At 6 PM

Grain Wharfage — do

1 — Mst Maitland for Cd Oake c/o Mumbardt & Co Loads 1248 Date: 3/0 2

2 — Mst Ethenfeld Loads 2411 Lbs Cl Rendal 7.90 by Cd Oake c/o Mumbardt & Co.

Remarks.

Rlpp. G. 5

O. G. Miller

Freight Agent

E. H. L. January 2nd, 1906. Plaintiffs' Exhibit G 6.
(See ante, p. 15.)

Berthing Report. Watonga Okla. 11/11 1904

At 7 Am.

None

Remarks.

At 12 Noon.

None

Remarks.

At 6 PM

None

Remarks.

O. J. Miller
Freight Agent

(See *ante*, p. 11.)

When the rates charged for transportation are less than tariff, the number of special authorizing such rate must be stated in the waybill.
Form 113. 5-'94—25 M.

Missouri, Kansas & Texas Railway Co. W. B. No., T. 57.

Cotton Waybill. No. 50750.

From Temple station — div. to New Orleans, 10/30, 1894. Whose car, Wabash.

Via Ft. Worth & T. & P. Kind of car, —.

Consignor.	Consignee and destination.	Bill of lading. No. bales signed for.	Bill of lading. Date of B. L.	Bill of lading. Number of B. L.	No. bales forwarded on this W. B.	Marks and tag Nos.	Weight.	Rate.	Freight.		Charges.		Prepaid.		Total to pay.	
A. Norden & Co.	Order Howard & Hotzen, Bremen, Ger'y.								Spl. Ct T. & P.	720 669 69						
								10 39.06 20 3 45.94	C. M. K. T. & P. Tft. S. S.							
E. D. & Co. S. S.	line.	200	10 . 30	F 43	40	G 14 X										
					20,412						Chas. 22	01				
	Transfer at Ft. Worth.				20,452		22,014	118	136	62					158	63

Stamped on face: "Compressed cotton. Foreign."
"Time freight. Hurry through."
"Transferred at Ft. Worth from car 5025 to car 1806 T. & P."

EMIL REISS ET AL.

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Form 113.

If cotton is to be compressed in transit, attach here a slip—form 125—properly filled up.

Missouri, Kansas & Texas Railway Co.

Cotton Waybill.

From Temple
To New Orleans,
Via Ft. Worth.

.....189.....

Waybill No.....
No. of car, 50750.
Whose car, Wabash.
Kind of car.....

By train.....of.....10, 31, '94.....189...
From.....to.....
.....S. Rice.....Conductor.

By train.....of.....189...
From.....to.....
.....Suessing.....Conductor.

By train.....of.....189...
From.....to.....
.....Conductor.

By train.....of.....189...
From.....to.....
.....Conductor.

(Stamped on face:)
"Time freight. Hurry through."
"Compressed cotton. Foreign."
"Set out at Westwego."

E. H. L., JANUARY 2, 1900. DEFENDANT'S EXHIBIT 6.

(See *ante*, p. 11.)

Form 3012½.

No. office. *Receipt for Cotton Delivered.* No. 1707.

Received from the Texas and Pacific Railway Co., in good order, New Orleans, 11/6, 1894.

Date of W. B.	No. of W. B.	No. of car.	Where from.	Shipper.	Consignee.	No. of bales.	Marks and tag numbers.	Weight.	Rate.	Charges.	Freight.	Remarks.
10/30	T. 57	T. P. 1806	Temple. B. L. F 43 200 B. C.	A. N. & Co.	Order Howard & H. Bremen, Ger.	40	S. 14 X.	MU	MU	MU	MU	
	E. & W. S. W. window cl	T. & P. 253 e-ted outside							O K. Post 1 11/7/94 Valler ubia.			

EMIL REISS ET AL.

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E. H. L., JANUARY 2, 1900. DEFENDANT'S EXHIBIT 7.

(See *ante*, p. 11.)

Form 3012½.

No. S. wharf. *Receipt for Cotton Delivered.* No. 1706.

Received from the Texas and Pacific Railway Co., in good order, New Orleans, 11/6, 1894.

Date of W. B.	No. of W. B.	No. of car.	Where from.	Shipper.	Consignee.	No. of bales.	Marks and tag numbers.	Weight.	Rate.	Charges.	Freight.	Remarks.
10 | 30	T. 58	T. P. 6207	Temple. B. L. F 43 200 B. C. Via E. D. line.	A. N. & Co.	Order Howard & H. Bremen, Ger.	40	S. 14 X.					
			253 cltd.				S. wharf. Nov. 7 | 94. Coffey.					
		253										

E. H. L., JANUARY 2, 1900. DEFENDANT'S EXHIBIT 8.

(See *ante*, p. 11.)

Form 3012½.

No. south margin. *Receipt for Cotton Delivered.* No. 1705.

Received from the Texas and Pacific Railway Co., in good order, New Orleans, 11/6, 1894.

Date of W. B.	No. of W. B.	No. of car.	Where from.	Shipper.	Consignee.	No. of bales.	Marks and tag numbers.	Weight.	Rate.	Charges.	Freight.	Remarks.
10 | 30	T. 59	T. P. 6358	Temple. B. L. F. 43 200 B. C. Via E.	A. N & Co. D. line.	Order Howard & H. Bremen, Ger.	20	S. 14 X.					
						20	P. O. C. J.					
						40	40	40	40	40	40	
	253 | 253 cltd.						11 | 7 | 94 South margin O K. Le Corgne.					

EMIL REISS ET AL.

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146 E. H. L., JANUARY 2, 1900. DEFENDANT'S EXHIBIT 9.

(See *ante*, p. 11.)

Form 3012½.

No. south margin. *Receipt for Cotton Delivered.* No. 1704.

Received from the Texas and Pacific Railway Co., in good order, New Orleans, 11/6, 1894.

Date of W. B.	No. of W. B.	No. of car.	Where from.	Shipper.	Consignee.	No. of bales.	Marks and tag numbers.	Weight.	Rate.	Charges.	Freight.	Remarks.
10 | 30	T. 60	T. P. 4332	Temple. B. L. F 43. 200 B. C.	A. Norden & Co.	Order Howard & H. Bremen, Ger.	40	POCJ.	Train.	Exp.	Wanglass.		11 | 6 | 94
		Via E. D. line.					1 B. C.,	2 hoops	off.			
	253 | 253 cltd.							11 |	7 | 94	South O K. Le	margin. Corgne.	

(See *ante*, p. 11.)

Form 3012½.

No. 3. *Receipt for Cotton Delivered.* No. 1703.

Received from the Texas and Pacific Railway Co., in good order, New Orleans, 11/6, 1894.

Date of W. B.	No. of W. B.	No. of car.	Where from.	Shipper.	Consignee.	No. of bales.	Marks and tag numbers.	Weight.	Rate.	Charges.	Freight.	Remarks.
10 | 30	T. 61	T. P. 6675 Via E. D.	Temple. B. L. F 43 200 B. C. line.	A. N. & Co.	Order Howard & H. Bremen, Ger.	40	P O C J Seal 253 none.	253-253 Post	none. 3 O K.	Matthews.		

EMIL REISS ET AL. 93

(See *ante*, p. 11.)

Form 1108. E. D. & Co.

The Texas and Pacific Railway Co. Sheet No. 2761.

Memorandum of Freight Transferred and Delivered to the —— Railway, at Westwego Station, this 12 *Day of Nov.*, 1894, *in Good Order and Condition (Unless Otherwise Noted), to be Forwarded as Indicated Hereunder.*

Waybill. Date.	Waybill. No.	Car. No. and initial.	Expense bill No.	Where from and shipper.	Consignee and destination.	Articles.	Weight.	Rates. Through.	Rates. Local.	Freight.	Charges.	Total to pay.	Prepaid.
10 | 30	T. 57	T. & P. 1806.	15079	Temple. A. N. & Co.	Order	Howard & Hotzen Bremen, Ger. 40 B. C.	22,014			136.62			
						G 14 X		10 59	06		22.01		
						B. L. F 43 (2 00)		3 45	94				
					C. M.	K. & T. 609 T. & P. 69		118				158.63	
			(1707)										

I hereby certify transfer to have been made, as per memorandum above.

——, *Agent.*

(Here follows plan of wharf, marked p. 149.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

150 E. H. L., JANUARY 2, 1900. PLAINTIFFS' EXHIBIT F.

(See *ante*, p. 11.)

Original. Form 2370.

The Texas & Pacific Railway Co.

Pro. No. 97.

NEW ORLEANS, LA., *Oct.* 19, 1894.

Messrs. Elder, Dempster & Co., agents Elder, Dempster & Co. S. S. line:

I have this day engaged 1,000 bales cotton for shipment by the Elder, Dempster & Co. S. S. line, for Bremen, Germany, at 45 94 cents per hundred pounds, compressed cotton, account of —— ——.

Delivery unrestricted.
Contract No. 69.

Yours respectfully,

E. D. & Co. M. & R. W.

—— ——,
Agent T. & P. Railway Co.

151 E. H. L., JANUARY 2, 1900. PLAINTIFFS' EXHIBIT H.

(See *ante*, p. 21.)

Form 3014.†

The Texas & Pacific Railway Co.

S. S. Leyden.

As per letter from C. G. M., 11, 7, '94.

Cotton notice No. —.
Trip No. 17.

NEW ORLEANS, *Nov.* 6, 1894.

Account.

The following-described cotton is now at this depot ready for delivery:

Manifest.	Expense No.	B. L. No.	No. B. C.	Marks.	Freight and charges.	Station from and consignor.
1375	599	F 38	14	E. N. N..	Terrell.....	F. P., 972.

Then follow three pages of similar details footing up 4,661 bales, and not covering any of the cotton in this suit.

152 E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT H.

(See *ante*, p. 18.)

WESTWEGO, LA., *Nov.* 1, '94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans, La.

DEAR SIR:

Cotton Report.

On hand in cars last report, 58 cars	3,386	B/c
Received today, 36 "	1,313	"
Unloaded today, 34 "	1,692	"
On hand in cars tonight, 61 "	3,007	"
On wharf tonight	20,193	"
Del. S. S. today	1,765	"
Total receipts this season	49,154	"
" " last "	35,840	"
" increase this "	13,314	"
" delivered S. S. this season	25,286	"
Forwarded to New Orleans	668	"

Insurance report.		S. S. line.	Dest.	On cars, 61.	
Through	4,331 B/c	E. D. line.	Bremen	515	B/c
"	5,375 "	"	Havre	884	"
"	4,447 "	"	Liverpool	151	"
"	3,000 "	Harrison.	"	45	"
Local	3,040			1,412	"

Cotton Ships' Report.

S. S. British Crown left wharf at 6 a. m. Her total cargo taken at the wharf is destined for Havre and consisted of 6,151 B/c and E. D. line 1 car oak lumber and E. D. line 1 car staves acc't E. D. line, five hundred fifty-nine (559) sacks C/s meal, on acc't Trufant and Co. 525 sacks C/s cake acc't Trufant and Co.

S. St. Irene took 898 B/c acc't McFadden and Bro. for Havre. Stoddard & Co. ag'ts and left wh'f at 3 p. m.

153 S. S. Hajeen took 867 B/c for Bremen acc't E. D. line.

S. S. Straits of Magellan waiting for cotton acc't McFadden & Bro. for Genoa, A. K. Miller, M. & Co. ag'ts.

S. S. Electrician expected for Liverpool cotton acc't Harrison line.

Resp'y, C. G. MILLER, *Ag't.*

E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT H.

(See *ante*, p. 18.)

WESTWEGO, LA., 11, 2, '94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans, La.

DEAR SIR:

Cotton Report.

On hand in cars last report, 61 cars		3,007	B/c
Received today,	15 "	604	"
Unloaded today,	34 "	1,593	"
On hand in cars tonight,	42 "	2,018	"
On wharf tonight		21,405	"
Delivered S. S. today		381	"
Total receipts this season		49,758	"
" " last "		37,114	"
" increase this "		12,644	"
" delivered S. S. this season		25,667	"
For'd to New Orleans		668	"

Insurance report.		S. S. line.	Dest.	On cars, 42.	
Through	4,152 B/c	E. D. line.	Bremen	562	B/c
"	5,474 "	"	Havre	885	"
"	4,497 "	"	Liverpool	34	"
"	3,000 "	Harrison.	"	75	"
Local	4,282 "	Local		462	"

154 *Cotton Ships' Report.*

S. S. Straits of Magellan waiting at wharf for Genoa cotton account McFadden and Bro. A. K. Miller M. & Co. ag'ts.

S. S. Hajeen took 381 B/c account Elder D. line for Bremen. Total receipts to date 1,248 B/c.

S. S. Electrician arrived at wharf at 7.35 a. m. and occupied outside berth opposite No. 2 shed the inside berth being taken up by S. S. Straits of Magellan. The stevedore refused to load her from this position although everything possible was done to facilitate the handling of the cotton, yet he refused to start loading and left wharf at 10.45 a. m. for Southport. This steamer was to load Liverpool cotton account of the Harrison line.

Resp'y, C. G. MILLER, *Ag't.*

E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT.

(See *ante*, p. 18.)

WESTWEGO, LA., *Nov.* 3, '94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans, La.

DEAR SIR:

Cotton Report.

On hand in cars last report, 42		2,018 B/c
Received today	40	1,109 "
Unloaded "	41	1,669 "
On hand in cars tonight,	41	1,458 "
On wharf tonight		21,580 "
Del'd S. S. today		1,494 "
Total receipts this season		50,867 "
" " last "		
" increase this "		
" del'd S. S. this "		27,161 "
For'd to New Orleans		668 "

155

Insurance report.	S. S. line.	Dest.	On cars.
Through 4,241 B/c	E. D. line.	Bremen	
" 6,014 "	"	Havre	1,072 B/c
" 4,497 "	"	Liverpool	254 "
" 3,000 "	Harrison	"	120 B/c
Local 3,828			12 "

Cotton Ships' Report.

S. S. Straits of Magellan took 957 B/c for Genoa acc't McFadden & Bro.

S. S. Hajeen took 537 B/c for Bremen acc't E. D. line. Total receipts to date, 1,785 B/cotton.

Respt., C. G. MILLER, *Ag't.*

E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT.

(See *ante*, p. 18.)

WESTWEGO, LA., 11, 5, '94.

Freight ag't.

Mr. C. G. Miller, ag't, New Orleans.

DEAR SIR:

Cotton Report.

On hand in cars, last report, 53 cars		2,039 B/c
Received today,	62 "	2,352 "
Unloaded "	24 "	922 "
On hand tonight,	91 "	3,469 "
On wharf "		21,122 "
Del'd S. S. today		2,110 "
Total receipts this season		54,530 "
" " last "		41,181 "
" increase this "		13,349 "
" delivered S. S. this season		29,271 "
For'd to New Orleans		668 "

156

Insurance report.	S. S. line.	Dest.	On cars, 91.
Through 6,581 B/c	E. D. line.	Havre	3,065 B/c
" 5,214 "	"	Liverpool	356 "
" 3,160 "	Harrison.	"	
" 3,916 "	E. D. line.	Bremen	48 "
Local, 2,251			

Cotton Ships' Report.

S. S. Straits of Magellan took 951 B/c for Genoa acc't McFadden & Bro., A. K. Miller, M & Co., agents.

Total receipts to date, 1908 B/c.

S. S. Hajeen took eleven hundred and fifty-nine (1,159) bales cotton a/c E. D. line for Bremen.

Total receipts to date 2,944 B/cotton.

Rehandled eleven cars for New Orleans.

Resp'y, C. G. MILLER, *Ag't.*

E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT.

(See *ante*, p. 18.)

WESTWEGO, LA., 11, 6, '94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans.

DEAR SIR:

Cotton Report.

On hand in cars last report, 91 cars		3,469	B/c
Received today	54 "	2,246	"
Unloaded "	13 "	549	"
On hand tonight,	132 "	5,166	"
On wharf "		19,695	"
Delivered S. S. today		1,976	"
Total receipts this season		56,776	"
" " last "		41,254	"
" increase this "		15,522	"
" delivered S. S. this season		31,247	"
For'd to New Orleans		668	"

157

Insurance report.		S. S. line.	Dest.	On cars, 132.	
Through,	6,880 B/c	Elder D. line.	Havre	3,904	B/c
"	5,416 "	"	Liverpool	672	"
"	3,060 "	Harrison.	"	37	"
"	2,871 "	E. D. line.	Bremen	553	"
"	1,461 "				

Cotton Ships' Report.

S. S. Straits of Magellan took 577 B/c acc't McFadden & Bro. for Genoa. A. K. Miller, M. & Co., agents. Total receipts to date 2,485 B/c.

S. S. Hajeen took 1,093 B/c for Bremen, acc't E. D. line. Total receipts to date 4,037 B/cotton.

S. S. Electrician took 100 B/c for Liverpool, acc't Harrison line. This ship arrived at wharf at 1 p. m. and dropped back at 2 p. m. to elevator wharf for grain a/c Glover & O., arrived again at cotton wharf opposite # 2 shed outside Straits of Magellan where she remained.

Rehandled 3 cars cotton for New Orleans.

Respec.,

C. G. MILLER, *Ag't.*

158 E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT.

(See *ante*, p. 18.)

WESTWEGO, LA., 11, 7, '94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans, La.

DEAR SIR:

Cotton Report.

On hand in cars last report, 132 cars	5,166	B/c
Received today, 29 "	1,204	"
Unloaded " 38 "	1,632	"
On hand tonight, 123 "	4,738	"
On wharf "	20,788	"
Delivered to S. S. today	1,966	"
Total receipts this season	57,980	"
" " last "	41,815	"
" increase this "	16,165	"
" delivered S. S. this season	33,213	"
For'd to New Orleans	668	"

Insurance report.	S. S. line.	Dest.	On cars, 123.	
Through, 7,026 B/c.	E. D. line.	Havre	4,182	B/c
" 5,743 "	"	Liverpool	449	"
" 2,298 "	Harrison.	"	37	"
" 3,682 "	E. D. line.	Bremen	20	"
Local, 1,739 "			50	"

Cotton Ships' Report.

S. S. Straits of Magellan took 412 B/c for Genoa acc't McFadden & Bro. A. K. Miller M. & Co. ag'ts. Total receipts to date 2,897 B/cotton.

S. S. Hajeen took 692 B/c for Bremen acc't E. D. line and left wharf at 11 a. m. Her total cargo taken at these wharves consisted of 4,729 B/c.

159 S. S. Electrician took 862 B/cotton for Liverpool acc. Harrison line. Total to date, 962 B/c.

Rehandled 7 cars cotton for New Orleans.

Resp'y, C. G. MILLER, *Ag't.*

E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT.

(See *ante*, p. 18.)

WESTWEGO, LA., 11, 8, '94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans, La.

DEAR SIR:

Cotton Report.

On hand in cars last report, 123 cars	4,738	B/c
Received today, 27 "	1,137	"
Unloaded today, 27 "	1,116	"
On hand tonight, 123 "	4,759	"
On wharf tonight	20,900	"
Delivered S. S. today	1,004	"
Total receipts this season	59,117	"
" " last "	42,626	"
" increase this season	16,491	"
" delivered S. S. this season	34,217	"
For'd to New Orleans	668	"

Insurance report.	S. S. line.	Dest.	On cars, 123.
Through, 7,528 B/c.	E. D. line.	Havre	4,740 B/c
" 6,152 "	"	Liverpool	19 "
" 1,431 "	Harrison.	"	
" 4,082 "	Bremen.	E. D. line	
Local, 1,707			

160 *Cotton Ships' Report.*

S. S. Straits of Magellan took 100 B/c for Genoa acc't McFadden and Bro., A. K. Miller, M. & Co., agents. Total cargo at this port consisted — 2,997 B/cotton and left wharf 9 a. m.

S. S. Electrician took 904 B/cotton for Liverpool acc't Harrison line. Total to date, 1,866 B/c.

S. S. Malabar arrived at wharf at 1 p. m. for c/s cake acc't Steinhardt & Co.

Rehandled five cars for New Orleans.

Resp'y, C. G. MILLER, *Ag'nt.*

E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT.

(See *ante*, p. 18.)

WESTWEGO, LA., 11, 9, '94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans, La.

DEAR SIR:

Cotton Report.

On hand in cars last report,	123 cars	4,759	B/c
Received today,	37 "	1,059	"
Unloaded today,	42 "	1,654	"
On hand tonight,	114 "	4,164	"
On wharf tonight		20,580	"
Delivered S. S. today		547	B/c
Total receipts this season		60,176	"
" " last "		43,520	"
" increase this season		16,656	"
" delivered S. S. this season		34,764	"
For'd to New Orleans		668	"

161 Insurance report.		S. S. line.	Dest.	On cars, 114.	
Through,	8,897 B/c	E. D. line.	Havre	3,839	B/c
"	5,867 "	"	Liverpool	215	"
"	599 "	Harrison.	"		
"	3,795 "	Bremen.	E. D. line	110	"
Local,	1,422 "				

Cotton Ships' Report.

S. S. Electrician took 547 B/c for Liverpool via Harrison line. Total to date, 2,413 B/c, and left wharf at 12.30 p. m.

S. S. Malabar took 1,578 sacks c/s cake, acc't Steinhardt & Co., for Copenhagen.

Rehandled 15 cars for New Orleans.

Resp'y, C. G. MILLER, *Ag't.*

162 E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT.

(See *ante*, p. 18.)

WESTWEGO, LA., 11, 10, '94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans, La.

DEAR SIR:

Cotton Report.

On hand in cars last report,	114 cars	4,164	B/c
Received today,	18 "	589	"
Unloaded today,	8 "	274	"
On hand tonight,	124 "	4,479	"
On wharf tonight		20,854	"
Delivered S. S. today			
Total receipts this season		60,765	"
" " last "		45,033	"
" increase this "		15,732	"
" delivered S. S. this season		34,764	"
For'd to New Orleans		668	"

Insurance report.		S. S. line.	Dest.	On cars, 124.	
Through,	B/c	E. D. line.	Havre	4,081	B/c
"	"	"	L'pool	314	"
"	"	Harrison.	"		
"	"	E. D. line.	Bremen	84	"
Local,	"				

Cotton Ships' Report.

S. S. Electrician took 1,524 sax c/s cakes for Steinhardt & Co.; total to date, 3,102 sax c/s cake.

S. S. Malabar took 3,401 sax c/s meal and 750 [redacted] acc't Steinhardt and Co.

Resp'y,

C. G. MILLER, *Ag't.*

[redacted] cars for New Orleans.

163 E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT.

(See *ante*, p. 18.)

WESTWEGO, LA., 11, 12, '94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans.

DEAR SIR:

Cotton Report.

On hand in cars last report,	145 cars	5,245	B/c
Received today,	65 "	2,760	"
Unloaded "	0 "	0	"
On hand tonight	206 "	8,005	"
On wharf "		20,879	"
Delivered S. S. today		0	"
Total receipts this season		64,316	"
" " last "		48,021	"
" increase this "		16,295	"
" del'd S. S. this "		34,764	"
For'd to New Orleans		668	"

Insurance report.		S. S. line.	Dest.	On cars, 206.	
Through,	11,438 B/c.	E. D. line.	Havre	6,726	B/c
"	5,892 "	"	Liverpool	125	"
"	599 "	Harrison.	"	25	"
"	2,700 "	E. D. line.	Bremen	100	"
Local	250 "			1,029	"

164 E. H. L., JANUARY 2, 1900. EXHIBIT DEF'T EX. Z, 1026.

(See p. 66, *ante*.)

Board of harbor masters, port of New Orleans, 187 Gravier street, room No. 5.

Ed. L. Cope, lower city limit to Canal St.
E. D. Dean, Canal to Henderson Sts.
Geo. Buchert, Henderson to Jackson Sts.
John J. Fitzgerald, Jackson St. to Southport.

Ed. L. Cope, president; John Davidson, sec'y and treasurer.

Port Regulations Applying to Westwego Wharves, Westwego, La., Port of New Orleans.

First. The harbor master has authority by law to regulate, moor and station all vessels at the wharf and to remove them from time to time to make room for others and the degree of accommodation which one vessel shall afford to another, the harbor master is constituted sole judge.

Second. Vessels coming to the wharf must have their yards braced sharp up by the port braces, their port anchor on the forecastle and their starboard anchor cocked billed, or at the hawse ready to let go. Boats, bumpkins and davits to be rigged in board.

165 Third. Jib-booms must be rigged in the full length before landing, and no jib-booms shall be rigged out unless by permission from the harbor master and then at their own risk.

Fourth. Any person cutting or interfering with the moorings of any vessels will be punished according to law.

Fifth. Any person throwing ballast, rubbish or anything that will sink into the river, will be punished according to law.

Sixth. The heating of pitch, tar or rosin is strictly prohibited on board any vessel lying at the wharf.

Seventh. Vessels will not anchor at or near the wharves without permission of the harbor master.

Eighth. No vessel shall change her berth without permission of the harbor master.

Ninth. Masters of vessels failing to comply with the above rules will be held responsible for all damages in consequence, besides laying themselves liable under the law.

Tenth. And in the absence of the harbor master the superintendent in charge is authorized to enforce these regulations, and to designate what accommodation which one vessel shall afford to another in conducting their business.

By order of the board of harbor masters.

ED. L. COPE, *President.*

Adopted Jan. 10th, '94.

165*a* The foregoing contains all the evidence offered or given on the trial of the cause, and upon the application of the plaintiffs this bill of exceptions is allowed by me and ordered to become part of the record in this cause at the term aforesaid, and to be filed *nunc pro tunc* as of the 2d day of January, 1900.

E. HENRY LACOMBE,
United States Circuit Judge.

It is hereby stipulated and agreed that the foregoing bill of exceptions contains all the evidence offered or given upon the trial of this cause, and that the same may be signed by the judge and be filed *nunc pro tunc*, as of the 2d day of January, 1900.

It is also stipulated that only one of the waybills and one of the transfer sheets referred to in the bill of exceptions and offered in evidence need be printed, and that Plaintiffs' Exhibit K (pages of the impression book), Plaintiffs' Exhibit H (being the document marked "Z 1006") need not be printed, but that the originals of the exhibits not printed may be read or referred to upon the argument of the cause by either party, if desired.

And it is further stipulated that the waybills and transfer sheets not printed are in the same general form as the specimen printed.

Dated February 2, 1900.

EVARTS, CHOATE & BEAMAN,
Attorneys for Defendants in Error.
RUSH TAGGART,
Attorney for Plaintiff in Error.

Filed Feb. 15, 1900.

166 In the Circuit Court of the United States for the Southern District of New York.

EMIL REISS, JAMES EDWARD REISS, and Frederick Reiss
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.
} Assignment of Errors.

Afterwards, to wit, at the same term at which the above-entitled suit was tried and judgment rendered, comes said defendant, by Rush Taggart, its attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

First. The court erred in denying the motion of the defendant to direct a verdict in favor of the defendant when the plaintiffs rested their case.

Second. The court erred in directing a verdict for the plaintiffs.

Third. The court erred in denying the defendant the right of going to the jury upon the question of fact that at the time this property was destroyed it was awaiting further conveyance.

Fourth. The court erred in refusing to allow the defendant to go to the jury upon the question of fact that the property was ready for delivery to the first connecting carrier or to consignee.

167 Wherefore, the defendant prays that the judgment entered herein may be set aside and reversed, and that a judgment in favor of this defendant herein be entered as prayed in the answer.

RUSH TAGGART,
Attorney for Defendant.

(Endorsed:) United States circuit court, southern district of New York. Emil Reiss *et al.*, plaintiffs, against The Texas and Pacific Railway Company, defendant. Assignment of errors. Rush Taggart, attorney for defendant, 195 Broadway, New York. U. S. circuit court. Filed Feb. 13, 1900. John A. Shields, clerk.

168 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

EMIL REISS, JAMES EDWARD REISS, Frederick Reiss, and Henry Jacques Reiss
vs.
THE TEXAS AND PACIFIC RAILWAY Company.
} Bond for Damages and Costs.

Know all men by these presents, that we, The Texas and Pacific Railway Company, as principal, and George J. Gould and Frank J. Gould, are held and firmly bound unto the above-named Emil Reiss, James Edward Reiss, Frederick Reiss and Henry Jacques Reiss, in the sum of fourteen thousand ($14,000) dollars, to be paid to the said Emil Reiss, James Edward Reiss, Frederick Reiss and Henry Jacques Reiss, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the eighth day of February, in the year of our Lord one thousand nine hundred.

Whereas, the above-named Texas and Pacific Railway Company has prosecuted its writ of error to the United States circuit court of appeals for the second circuit, to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York,

169 Now, therefore, the condition of this obligation is such, that if the above-named Texas and Pacific Railway Company shall prosecute said writ of error to effect and answer all damages and costs, if it fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

GEO. J. GOULD.
FRANK JAY GOULD.
THE TEXAS AND PACIFIC RAILWAY CO.,
By C. E. SATTERLEE,
Secretary and Treasurer.

[SEAL.]

Attest: C. E. SATTERLEE, *Sec'y.*

Sealed and delivered and taken and acknowledged this eighth day of February, 1900, before me—

B. W. T. FOX,
Notary Public, Kings County, N. Y.

[SEAL.]

Certificate filed in New York county.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss:

George J. Gould and Frank J. Gould, being duly sworn, doth each for himself, depose and say, that he is worth the sum of twenty-eight thousand dollars ($28,000) over and above all his just debts and liabilities.

GEO. J. GOULD.
FRANK J. GOULD.

Sworn to this 8th day of February, A. D. 1900, before me—
B. W. T. FOX,
Notary Public, Kings Co., N. Y.

Certificate filed in New York county.

170 UNITED STATES OF AMERICA, }
Southern District of New York, } ss:

On this 8th day of February, 1900, before me, the undersigned notary public, came Charles E. Satterlee, the secretary and treasurer of the Texas and Pacific Railway Company, to me known to be such, and acknowledged that he executed the within bond as his free and voluntary act, and as the free and voluntary act of the said Texas and Pacific Railway Company, and that the seal attached is the seal of said company.

B. W. T. FOX,
[SEAL.] *Notary Public, Kings County, N. Y.*

Certificate filed in New York county.

(Endorsed:) U. S. circuit court, southern district of New York. Emil Reiss *et al. vs.* Texas & Pacific Railway Co. Bond for damages and costs on writ of error. Rush Taggart, attorney for Tex. & Pac. R'y Co. Approved as to form and also as to sufficiency of surety, with reservation, however, to the appellee of the right at any time to examine the proper sureties under oath touching their assets, liabilities, and financial condition generally. E. H. Lacombe, U. S. circuit judge. U. S. circuit court. Filed Feb. 14, 1900. John A. Shields, clerk.

By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To Emil Reiss, James Edward Reiss, Frederick Reiss, and Henry Jacques Reiss, and Evarts, Choate & Beaman, their attorneys, Greeting:

You are hereby cited and admonished to be and appear be-
171 fore a United States circuit court of appeals for the second circuit, to be holden at the borough of Manhattan, in the city of New York, in the district and circuit above named, on the 13th day of March, 1900, pursuant to a writ of error filed in the

clerk's office of the circuit court of the United States for the southern district of New York, wherein The Texas and Pacific Railway Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 15th day of February, in the year of our Lord one thousand nine hundred, and of the Independence of these United States the one hundred and twenty-fourth.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States circuit court of appeals for the second circuit. The Texas and Pacific Railway Company *vs.* Emil Reiss *et al.* Citation. Service of a copy of the within citation is hereby admitted. Dated N. Y., Feb'y 14, 1900. Evarts, Choate & Beaman. U. S. circuit court. Filed Feb. 14, 1900. John A. Shields, clerk.

172 United States Circuit Court of Appeals for the Second Circuit, October Term, 1899.

Submitted March 16, 1900; decided March 16, 1900.

THE TEXAS & PACIFIC RAILWAY Company, Plaintiff in Error, *vs.* EMIL REISS ET AL., Defendants in Error.	No. 150. Error to the Circuit Court of the United States for the Southern District of New York. Before Judges Wallace and Shipman.

Judgment affirmed on the opinion in the former appeal.

Rush Taggart, for the plaintiff in error.
Treadwell Cleveland, for the defendants in error.

173 At a stated term of the United States circuit court of appeals in and for the second circuit, held at the court-rooms, in the post-office building, in the city of New York, on the 26th day of March, one thousand nine hundred.

Present: Hon. William J. Wallace, Hon. Nathaniel Shipman, circuit judges.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
EMIL REISS ET AL., Defendants in Error.

Error to the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the southern district of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said circuit court be, and it hereby is, affirmed with costs.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

W. J. W.

174 [Endorsed:] United States circuit court of appeals, second circuit. Texas & Pacific Railway Co. *vs.* Emil Reiss *et al.* Order for mandate.

(Endorsed:) United States circuit court of appeals, second circuit. Filed Mar. 28, 1900. Wm. Parkin, clerk.

175 United States Circuit Court of Appeals for the Second Circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, *against* EMIL REISS, JAMES EDWARD REISS, FREDERICK REISS, and HENRY JACQUES REISS, Defendants in Error. } Assignment of Errors.

Now comes The Texas & Pacific Railway Company, plaintiff in error, and says there is error in the record and proceedings in the above-entitled matter in this, to wit:

I.

That the said circuit court of appeals erred in affirmin- the judgment of the circuit court rendered against The Texas & Pacific Railway Company, plaintiff in error, and in favor of the defendants in error upon the trial of said cause.

II.

That the said court erred in holding that the circuit court committed no error in denying the motion of the Texas & Pacific Railway Company upon the trial of said action to direct a verdict in its favor when the defendants in error rested their case.

III.

That the said court erred in holding that the circuit court committed no error in directing a verdict in favor of the defendants in error upon the trial of said cause.

IV.

That the said court erred in holding that the circuit court
176 committed no error in denying to the said The Texas & Pacific Railway Company the right of going to the jury upon the question of fact that at the time this property was destroyed it was awaiting further conveyance.

V.

That the said court erred in affirming the action of the circuit court in refusing to allow The Texas & Pacific Railway Company upon the trial of said cause to go to the jury upon the question of fact that the property was ready for delivery to the next connecting carrier or to consignee.

Wherefore the Texas & Pacific Railway Company prays that the judgment entered herein against it may be set aside and reversed, and that a judgment in its favor may be entered, as prayed in its answer.

RUSH TAGGART,
Attorney for Plaintiff in Error, No. 195 Broadway, New York City, N. Y.

177 [Endorsed:] U. S. circuit court of appeals for the second circuit. Texas and Pacific Railway Co., plaintiff, against Emil Reiss *et al.*, defendant-. Assignment of errors. Rush Taggart, attorney for plaintiff in error, 195 Broadway, New York. United States circuit court of appeals, second circuit. Filed May 12, 1900. William Parkin, clerk.

178 United States Circuit Court of Appeals for the Second Circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, *against* EMIL REISS, JAMES EDWARD REISS, FREDERICK Reiss, and Henry Jacques Reiss, Defendants in Error. } Bond for Damages and Costs.

Know all men by these presents that we, The Texas & Pacific Railway Company, as principal, and Geo. J. Gould and Frank Jay Gould, as sureties, are held and firmly bound unto the above-named Emil Reiss, James Edward Reiss, Frederick Reiss, and Henry Jacques Reiss in the sum of fourteen thousand dollars ($14,000), to be paid to the said Emil Reiss, James Edward Reiss, Frederick Reiss, and Henry Jacques Reiss, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of April, in the year of our Lord one thousand nine hundred.

Whereas lately, at a term of the United States circuit court for the southern district of New York, at the October term, 1899, in a suit depending in said court between Emil Reiss, James Edward Reiss, Frederick Reiss, and Henry Jacques Reiss, plaintiffs, and The Texas & Pacific Railway Company, defendant, a judgment was rendered against said The Texas & Pacific Railway Company for the

sum of six thousand seven hundred five and $\frac{38}{100}$ dollars
179 ($6,705.38) and the costs of said suit—in all, six thousand seven hundred sixty-five and $\frac{43}{100}$ dollars ($6,765.43); and

Whereas the said The Texas & Pacific Railway Company duly obtained a writ of error from the United States circuit court of appeals for the second circuit, which court on the 26th day of March, 1899, rendered a judgment affirming said judgment in all particulars; and the said The Texas & Pacific Railway Company having sued out a writ of error from the Supreme Court of the United States and having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Emil Reiss, James Edward Reiss, Frederick Reiss, and Henry Jacques Reiss, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof:

Now the condition of the above obligation is such that if the said The Texas & Pacific Railway Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By C. E. SATTERLEE, *Sec'y & Treas.*
GEO. J. GOULD.
FRANK JAY GOULD.

Sealed and delivered in the presence of—
Attest:
[SEAL.] C. E. SATTERLEE, *Sec'y.*

Approved, and to operate as a supersedeas, by—
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

180 [Endorsed:] Copy. United States circuit court of appeals for the second circuit. The Texas and Pacific Railway Company, plaintiff, against Emil Reiss *et al.*, defendants. Bond for damages and costs. Rush Taggart, attorney for plaintiff in error, 195 Broadway, New York. United States circuit court of appeals, second circuit. Filed May 12, 1900. William Parkin, clerk.

181 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 180, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Texas & Pacific Railway Company against Emil Reiss *et al.* as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 16th day of May, in the year of our Lord one thousand nine hundred, and of the Independence of the said United States the one hundred and twenty-fourth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled 5, 16, '00. W. P.]

182 UNITED STATES OF AMERICA, *ss:*

To Emil Reiss, James Edward Reiss, Frederick Reiss, and Henry Jacques Reiss or their attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the second circuit, wherein The Texas and Pacific Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this tenth day of May, in the year of our Lord one thousand nine hundred.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

183 [Endorsed:] Ent. Citation. Reiss. U. S. Supreme Court. Reiss *v.* Tex. & Pac. Citation. Service of a copy of within citation is admitted. May 14, 1900. Evarts, Choate & Beaman, pl'ffs' att'ys. United States circuit court of appeals, second circuit. Filed May 12, 1900. William Parkin, clerk. Rec'd May 14, 1900, adm.

184 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Texas and Pacific Railway Company, plaintiff in error, and Emil Reiss, James Edward Reiss, Frederick Reiss, and Henry Jacques Reiss, *and* defendants in error, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly

corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10 day of May, in the year of our Lord one thousand nine hundred.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

185 [Endorsed :] Writ. Reiss. Service of a copy of the within writ of error is hereby admitted. Dated May 14, 1900. Evarts, Choate & Beaman, att'ys for pl'ffs. United States circuit court of appeals, second circuit. Filed May 12, 1900. William Parkin, clerk.

Endorsed on cover: File No., 17,792. U. S. C. C. of appeals, 2nd circuit. Term No., 307. The Texas and Pacific Railway Company, plaintiff in error, *vs.* Emil Reiss *et al.* Filed June 4, 1900.

SUPREME COURT OF THE UNITED STATES.

THE TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
against
EMIL REISS ET AL.

Number 307,
October Term, 1900.

We hereby stipulate that the following corrections may be made in the transcript of record herein, the numbering of pages referring in this stipulation to the printed pages:

1. Page 8: For the words "Printed *post* at pp. 109 *et sec.*" substitute "Printed *post* at pp. 77 & 78."
2. Page 8: For the words "Printed *post* at pp. 112 *et sec.*" substitute "Printed *post* at pp. 79 to 84 inclusive."
3. Page 8: For "Printed *post* at pp. 118 *et sec.*" substitute the words "Printed *post* at page 84."
4. Page 8: For "Printed *post* at pp. 121 *et sec.*" substitute "Printed *post* at page 86."
5. Page 13: Strike out the words "and made a part thereof (printed *post* at pp. 129 *et sec.*)" and substitute therefor, "One of said waybills is printed at page 87; by stipulation printed at page 87; by stipulation printed at page 106 the printing of the other waybills was waived."
6. Page 14: For the words "Printed *post* at pp. 131 *et sec.*" substitute "Printed *post* at pages 89 to 94 inclusive."
7. Page 14: For "Printed *post* on pp. 136 *et sec.*" substitute "One of such transfer sheets is printed at page 94. By stipulation printed at page 106 the printing of the other transfer sheets was waived."
8. Page 14: For "Printed *post* at pp. 138 *et sec.*" substitute "Printed *post* on page 95."
9. Page 16: For "Printed *post* at pp. 122 *et sec.*" substitute "Printed *post* at original pages 134 to 140 inclusive between print- pages 86 & 87."
10. Page 18: For the words "See *post* at pp. 140 *et sec.*" substitute the words "Printed at pages 96 to 105 inclusive."
11. Page 20: For the words "Printed *post* pp. 139 *et sec.*" substitute the words "Printed *post* page 95."
12. Page 25: For the words "*Post* pp. — *et sec.*" substitute "*Post* p. 106."
13. Page 40: For the word "Map" on page 40 substitute the word "Diagram."

14. Page 40: For the words "Printed *post* at page 137 *et sec.*" substitute "Printed *post* between printed pages 94 & 95."
15. Page 49: For the words "Printed p. 152 *post*," substitute the words "Printed *post* 105–106."
16. Page 50: For the words "Printed *post* at p. 120 *et sec.*" substitute "Printed *post* between pages 84 & 85."
17. Page 77: For the words "See *ante*, page 2" substitute the words "See *ante* p. 8."
18. Page 79: For the words "See *ante* p. 2" substitute the words "See *ante* p. 8."
19. Page 84: For the words "See *ante* p. 2" substitute the words "See *ante* p. 8."
20. On map between pages 84 and 85 for the words "See *ante* p. 67" substitute the words "See *ante* p. 50."
21. Page 86: For the words "See *ante* p. 2" substitute the words "See *ante* p. 8."
22. On diagram between printed pages 86 and 87, original 134 to 140 inclusive, for the words "See *ante* p. 15" substitute the words "See *ante* p. 16."
23. Page 87: For the words "See *ante* p. 11" substitute the words "See *ante* p. 13."
24. On pages 89, 90, 91, 92 and 93 for the words "See *ante* p. 11" substitute the words "See *ante* pages 13 and 14."
25. Page 94: For the words "See *ante* p. 11" substitute the words "See *ante* p. 14."
26. On diagram between printed pages 94 and 95 for the words "See *ante* p. 51" substitute "See *ante* p. 40."
27. Page 95: For the words "See *ante* p. 11" substitute the words "See *ante* p. 14."
28. Page 95: For the words "See *ante* p. 21" substitute the words "See *ante* p. 20."

The exhibits printed on pages 96 to 105 inclusive headed "Cotton reports" should not be marked "H" but should be marked P 1, P 2, P 3, P 4, P 5, P 6, P 7, P 8 & P 9.

Page 105: For the words "See p. 66 *ante*" should be substituted the words "See p. 49 *ante*."

On the Berthing reports which are Plaintiff's Exhibits G to G 6 inclusive and are between printed pages 86 and 87, the numbering at the top of the pages of 122, 123, 124, 125, 126, 127 and 128 should be stricken out.

The following corrections should be made in the index:

Plaintiff's Exhibit "D" should not be called a diagram but a map.

Plaintiff's Exhibit- G to G 6 inclusive, should not be called "diagrams," but "Berthing reports."

Defendants' Exhibit- 6 to 10 should not be called "receipts" but "skeletons."

Plaintiff's Exhibit F should not be called "notice" but "contract."

The "Cotton reports" which are on pages 2 and 3 of the index should not be marked "H" but P 1 to P 9 inclusive.

New York, Sept. 24th, 1901.

RUSH TAGGART,
Attorney for Plaintiff in Error.
TREADWELL CLEVELAND,
Counsel for Def't- in Error.

[Endorsed:] No. 307. United States Supreme Court, October term, 1900. The Texas & Pacific Railway Co., plaintiff in error, against Emil Reiss *et al.* Stipulation. Rush Taggart, Esq., attorney for plaintiff in error. Treadwell Cleveland, Esq., attorney for *plaintiff* in error.

[Endorsed:] File No., 17,792. Supreme Court U. S., October term, 1901. Term No., 77. The Texas and Pacific Railway Co., P. E. *vs.* Emil Reiss *et al.* Stipulation to correct record. Filed Sept. 27, 1901.

FILED
SEP 27 1901
JAMES H. McKENNEY

No. 77.

By. of Taggart & Masten for Pl. in Err.

Filed Sept. 27, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 77

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

EMIL REISS, JAMES EDWARD REISS, FREDERICK REISS and HENRY JACQUES REISS,
Defendants in Error.

Brief of Texas and Pacific Railway Company.

RUSH TAGGART,
ARTHUR H. MASTEN,
Counsel for Plaintiff in Error.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 307.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff-in-Error,

vs.

EMIL REISS, JAMES EDWARD REISS, FREDERICK REISS and HENRY JACQUES REISS,
Defendants in Error.

Statement of the Case.

This case comes into this Court by writ of error from the Circuit Court of Appeals of the Second Circuit, which affirmed the judgment entered in favor of the defendants in error rendered upon a verdict of a jury directed by the Circuit Court of the United States for the Southern District of New York.

The action in the Circuit Court was brought to recover the value of cotton burned at Westwego, in the State of Louisiana, on the night of the 12th of November, 1894. This cotton had been shipped from

Temple, Texas, on the Missouri, Kansas and Texas Railway, to be carried over that railway, the railway of the defendant the Texas and Pacific Railway, to New Orleans, and from New Orleans to Bremen, Germany. These two lines of railway and the steamship line made up the total route of carriage for this action.

The method of handling this cotton at Westwego had been considered by this Court, and is in general very accurately stated in the case of the Texas and Pacific Railway Company vs. Clayton, 173 U. S., 352, 353, and, as described in that case, was as follows :

" The mode in which the railway company and the steamship company transacted business was as follows : Upon the shipment of cotton, bills of lading would be issued in Texas to the shipper. Thereupon the cotton would be loaded in the cars of the railway company and a way bill indicating the number and initial of the car, the number of the bill of lading, the date of shipment, the number of bales of cotton, the consignor, the consignees, the date of the bill of lading, the number of bales forwarded on that particular way bill, the marks of the cotton, the weight, rate, freights, amount prepaid, etc., would be given to the conductor of the train bringing the car to Westwego. Upon the receipt of the way bill and car at Westwego, a 'skeleton' would be made out by the clerks at that place for the purpose of unloading the car properly. It contained the essential items of information covered by the way bill, and had also the date of the making of the skeleton. When this skeleton had thus been made out and the car had been pushed in on the side track in the rear of the wharf, it would be taken by a clerk known as a 'check clerk,' and with a gang of laborers, who actually handled the cotton and were employed by the railway company, the car would be opened, and as the cotton was taken from the car bale by bale the marks would be examined to see that they corresponded with the items of the skeleton, and the same were then

checked. The cotton thus taken from the car was deposited at the place on the wharf designated by the check clerk, and it would remain there until the steamship company came and took it away. After the checking of the cotton in this way to ascertain that the amounts, marks and general information of the way bill were correct, the skeleton would be transmitted to the general office of the Texas and Pacific Railway Company in New Orleans which would thereupon make out what was designated as a 'transfer sheet' that contained substantially the information contained in the way bill, and which being at once transmitted to the steamship company or its agents, was a notification understood by the steamship company's agents that cotton for their line was on the wharf at Westwego ready for them to come and take away. Upon the receipt of these transfer sheets the steamship company would collate the transfers relating to such cotton as was destined by them for a particular vessel, advise the railway company with the return of the transfers that this cotton would be taken by the vessel named, and would thereupon send the vessel with their stevedores to the wharf at Westwego. The clerk at Westwego would go around the wharf and by the aid of the transfers returned from the steamship agents point out to the master or mate of the vessel or the one in charge of the loading the particular lots of cotton named in the transfers and designated for his vessel, and the stevedores and their helpers would thereupon take the cotton and put it on board the ship. In connection with the loading upon the vessel or after the cotton was pointed out in lots, the master or mate would sign a mate's receipt for this cotton. The stevedores and all men employed in loading the vessel were wholly in the employ of the steamship company. The time of coming to take the cotton from the wharf was entirely within the control of the steamship company. They sent for it as soon as they were ready."

This statement of the method of dealing between the steamship company and the Texas and Pacific Railway Company should be supplemented by the additional fact alluded to in the opinion of the Circuit Court of Appeals (but not correctly stated in the opinion), to the effect that it was customary for the

steamship company to send a steamer to Westwego and get cotton without returning the transfer sheets. This is erroneously stated, as I have said, in the Circuit Court of Appeals opinion, as a practice which had grown up since the fire. This statement of the opinion is contrary to the evidence which is found in the testimony of Mr. Wilkinson (p. 38) as follows:

Q. What other method was there in the custom of doing business there?

A. I would frequently get a telephone message what ship would be there and to give her what she would take. I would also have a stevedore that was handling cotton come in and say, "I will just take all this." Then they would just jam in everything if the bill of lading was complete. By saying if the bill of lading was complete, I mean, for instance, F 43 from Temple calls for 200 bales of cotton split up into four or five or six lots, we would not consider that bill of lading complete until all that cotton had arrived there ready for delivery. Unloaded on the wharf ready or the cars so that we could put it right to them. We received those telephone communications from the New Orleans office, and we also received them from the steamship agent asking me to give them the cotton. From Elder, Dempster & Company I would receive the communications by telephone, with no relation to a communication of this sort, pretty near as often as I would get one of those memorandums.

"Q. Have you ever had any talk with any representative of Elder, Dempster & Company respecting the giving of cotton to a ship that had room for it, where the bills of lading were complete, without regard to the question of whether the transfer or skeletons had been forwarded from Westwego?

"A. I have had with the senior Mr. Warriner, the agent of Elder, Dempster & Company, and with Mr. Powers, their head stevedore. Mr. Warriner said on that subject to give them all she could take, that is where the bills of lading were complete; of course, we would not make delivery unless the bills of lading were complete. I had that conversation over the telephone and I have had it on the wharf with the stevedore."

The other testimony upon the subject, that which the Circuit Court of Appeals must have relied upon is that of Mr. Warriner, who testifies at page 33 as follows:

"Q. Mr. Miller has testified, as I understand him, that there was a practice of loading cotton on your ships at Westwego for which he had received no regular transfers from your office; do you know of such a practice?

"A. The practice has been more general since the fire than before. It was not the practice before, according to my recollection. We are prepared to take any cotton at any time that we have room for, receive it when it is delivered to the ship and sign for it in the same way."

Mr. Miller also testified (pp 14 and 15):

"Q. What was the method practiced with reference to giving steamers cotton not named in the transfers returned to the office in case there was capacity in the vessel to receive it?

"A. The practice was to give the steamships all the cotton they would receive and take on board, regardless of whether the cotton was covered by the regular transfer orders or not."

Westwego was situated on the west bank of the Mississippi River, at a point opposite the upper portion of the City of New Orleans. A branch track from the main line of the Texas and Pacific led off to the bank of the river, and on the bank of the river was situated a large cotton wharf which extended out over the water, so that vessels could come up to the side of the wharf and load cotton which had been deposited upon the wharf. The tracks of the Texas and Pacific Railway were conducted along the rear of the wharf and sufficiently depressed below the platform of the wharf so that the floor of the cars would be upon a level with the top of the wharf. There was also at

this point, some little distance from the wharf, a large elevator for the handling and storing of grain and a conveyor from the elevator to a loading point below the wharf at which the grain could be loaded into ocean vessels.

For several years prior to the date of the fire this had been the recognized place of delivery by the Texas and Pacific Railway Company of export cotton to the various steamship lines coming to New Orleans. After the construction of this wharf in 1892, the delivery of export cotton by the Texas and Pacific Railway Company at any other point to steamship lines for carriage to Europe had almost entirely ceased. Westwego was not within the limits of the Customs District of New Orleans, as defined by Act of Congress.

In the case at bar the course of business above outlined was followed. The cotton involved in this case arrived at Westwego on the 5th and 6th of November and was unloaded on the 6th of November. The regular course of business was followed with respect to this cotton. It was located at the place on the wharf where it was to remain until the steamship would come for it, but no notification by the sending of transfer sheets had been given to the steamship company at the time of the fire.

The bill of lading, under which the cotton was shipped, was issued by the Missouri, Kansas and Texas Railway Company, and is expressed to be on behalf of the Missouri, Kansas and Texas Railway Company of Texas, and the Texas and Pacific Railroad and the Elder, Dempster Co. S. S. Line. The provisions of this bill of lading are materially different from those considered in the Clayton case.

The material parts of this bill of lading are the following:

"Conditions with respect to the service until delivery at the Port of New Orleans, La. It is agreed that * * *

"(3) No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property or after due time for the delivery thereof, no carrier hereunder shall be liable in any event. * * *

"(11) No carrier shall be liable for delay nor in any other respect than as Warehousemen while the said property awaits further conveyance, and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer of the ocean line above stated leaving after the arrival of said property at such port, the carrier hereunder then in possession is at liberty to forward said property by the succeeding steamer of said line or if deemed necessary by any other steamer.

"(12) This contract is executed and accomplished and all liability hereunder terminates on the delivery of the said property to the steamship, her master, agent, or servants or to the steamship company or on the steamship pier at the said port; and the inland freight charges shall be a first lien due and payable by the steamship company" (Record, pp. 79, 80, 81).

This case was tried in the Circuit Court, and upon the first trial the trial Court was of the opinion that, under the provisions of the first part of the 11th clause the defendant railway company held the property at

the time of the fire as a warehouseman, because it was awaiting "further conveyance," and there being no proof of negligence a verdict was directed for the defendant.

Judgment was entered upon this verdict.

The plaintiffs below carried the case to the Circuit Court of Appeals upon writ of error, which reversed the judgment, upon the ground that inasmuch as notification of the arrival of the cotton at Westwego had not been given to the steamship company, the property was not awaiting "further conveyance" within the meaning of the 11th clause of the bill of lading, and sent the case back for a new trial. The opinion of the Court upon this appeal may be found in 98 Federal Reporter, 533.

Upon the retrial of the case, there being no change in this particular in the testimony, the trial Court directed a verdict in favor of the plaintiffs for the value of the cotton. Writ of error was taken to the Circuit Court of Appeals by the defendant below, and the judgment was affirmed on the opinion rendered upon the former trial (Record, p. 110). The defendant railway company brings the case to this Court, making the following assignments of error.

I.

That the said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court rendered against The Texas and Pacific Railway Company, plaintiff in error, and in favor of the defendants in error upon the trial of said cause.

II.

That the said Court erred in holding that the Circuit Court committed no error in denying the motion of the Texas and Pacific Railway Company upon the trial of said action to direct a verdict in its favor when the defendants in error rested their case.

III.

That the said Court erred in holding that the Circuit Court committed no error in directing a verdict in favor of the defendants in error upon the trial of said cause.

IV.

That the said Court erred in holding that the Circuit Court committed no error in denying to the said The Texas and Pacific Railway Company the right of going to the jury upon the question of fact that at the time this property was destroyed it was awaiting further conveyance.

V.

That the said Court erred in affirming the action of the Circuit Court in refusing to allow The Texas and Pacific Railway Company upon the trial of said cause to go to the jury upon the question of fact that the property was ready for delivery to the next connecting carrier or to consignee.

ARGUMENT.

I.

The cotton involved in this suit was subject to the provision of the 11th clause: "No carrier shall be liable for delay nor in any other respect than as warehouseman, while the said property awaits further conveyance."

This bill of lading is divisible into two distinct parts, which amount to separate and distinct contracts (Liverpool Co. vs. Phœnix Ins. Co., 129 U. S., 397). The first twelve conditions named relate to service until delivery at the port of New Orleans. The remaining fifteen relate to service after the delivery at the port of New Orleans, and inasmuch as the conditions of the service are entirely distinct and separate, each must be looked to separately to discover the meaning of the contract between the parties. The Circuit Court of Appeals was of the opinion that clause 11 could not apply so long as no notice had been given to the connecting carrier, and says:

"The language is too indefinite to support a conclusion that notice to the connecting line was not a prerequisite to the change of liability to that of a warehouseman. It may well be that such change would take place when the property was awaiting conveyance by the connecting line which had been notified to receive and convey, but until then it is not awaiting conveyance; it is awaiting the action of the first carrier. The term must mean awaiting conveyance by the person upon whom the duty of conveyance devolved, and no such duty devolved until notice of the arrival of the property had been given."

But we submit that this is a begging of the whole

question and does not construe this paragraph of the bill of lading in the light of all the other clauses relating to the service until delivery at the port of New Orleans. Thus, clause 3 provides that:

"No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee."

Paragraph 12 provides that:

"This contract is executed and accomplished and all liability hereunder terminates on the delivery of the said property to the steamship or master, agent or servant, or to the steamship company or on the steamship pier at the said port."

Evidently Section 11 is intended to apply to a different condition of affairs from that provided for in paragraphs 3 and 12. Under the facts in this case it is undisputed that this wharf at Westwego, under the practice and under the express agreement with the steamship company, the connecting carrier in this case, was the place of delivery of this cotton to the steamship company. Westwego was the terminus of the railway company at which the steamship company had agreed to receive this cotton, and as is conceded in the opinion of the Circuit Court of Appeals the duty of the steamship company to receive and convey would arise upon notice of the arrival of the property upon this wharf. If that is the case the uncontradicted fact is that this cotton was unloaded and deposited upon the wharf at the place where it would remain until the steamship company would come and take it away. Its duty thus to come and take it away, under the opinion of the Circuit Court of Appeals, only depended upon the reception

of a notice that it was thus located upon the wharf. Upon the giving of such notice, the provision of Section 3 would have perfect application, because clearly the property would be "ready for delivery to the next carrier." The Texas and Pacific Railway Company would, upon the case supposed, have carried the property over its own route and at the end of the route would have unloaded it, and deposited it in the place agreed upon with the connecting carrier, and upon giving the notice would have done all it could do except to deliver to the next carrier. Even if the position taken in the opinion of the Circuit Court of Appeals, that the decision in the Clayton case goes to the extent that such action would not amount to delivery to the connecting carrier (a position which we do not concede by any means), yet it seems to us incontrovertible that the railway company would be in the position of having fully discharged its duty up to the point of actual delivery and that it must be deemed to hold the cotton "ready for delivery to the next carrier." Under Section 3 of the bill of lading this would be a termination of its liability because the contract of the parties as contained in paragraph 3 expressly releases the carrier from liability for loss or damage "after said property is ready for delivery to the next carrier." On the first trial the trial Court intimated a doubt as to the validity of this stipulation of paragraph 3, but the decision of this Court in Constable vs. Steamship Co. (154 U. S., 51), is an express authority in favor of the entire validity of a stipulation in a bill of lading defining the cessation of liability much more strictly in favor of the carrier than in the case at bar.

The opinion of the Circuit Court of Appeals discusses the absence of notice and its effect upon the relations of the parties under paragraph 11, precisely as though the question were whether the provisions of paragraph 3 or paragraph 12 applied. The provisions of the bill of lading in this case are so different from those of the Clayton case that the language quoted from that case is entirely inapplicable to this case. In that case, there was the express provision that the carrier in whose "actual custody" the cotton was should be liable in case of fire. By that clause, any question of constructive delivery to the connecting carrier was expressly excluded, as this Court says in the opinion. But in this case the very opposite condition is expressly stipulated for in the bill of lading, and paragraphs 3 and 12, we submit, are intended to cover such a case as we would have in the case at bar had notice been given to the steamship company of the arrival of the cotton at Westwego, which notice would be understood by the steamship company as a request to come and take away the cotton. Now, it is precisely such a condition which the Circuit Court of Appeals decides must exist to allow the provisions of paragraph 11 to have application and effect, although it is very evident, upon an inspection of the bill of lading, that they were not intended to cover the same conditions or class of facts.

If we are right in this view of the application and scope of paragraphs 3 and 12 of the bill of lading, then it is evident that in inserting paragraph 11, which does not provide for entire cessation of liability, but simply for a modified liability under certain conditions, then the parties must have been stipulating for something not provided for in paragraph 3, and we must find a

condition of things to which paragraph 11 may attach not covered by paragraphs 3 or 12. Under paragraphs 3 and 12 the liability entirely terminates under the conditions named when the one carrier has entirely performed its duty to the cotton, and has in the one case the cotton ready for delivery, and in the other case, when it has been delivered as in paragraph 12 set forth. Paragraph 11 seems to contemplate an entirely different situation of affairs, and that is, the settlement of the question, first, of liability for delays in this transportation, and then, second, and connected with the matter of delay, of which the carrier is relieved, was the question of the extent of liability of the carrier during the deposit of the property at terminal points, pending the doing of the very things that are described in the course of business at Westwego, viz., the making out of the proper records of the receipt of the property; the forwarding of such records to the connecting carrier as notice to such connecting carrier, and the connecting carrier's use of such records, and making proper arrangements thereafter for the receipt by it of the property, and its further carriage, during all of which the property is in a position where it may be considered as exposed to greater dangers than when in the course of continuous carriage. In view of such delays, and the contingencies incident thereto, which were liable to occur on a through shipment like this, composed of several dependent rail lines and steamship lines, which might be prolonged more or less by reason of the very things which occurred at and about New Orleans in connection with this case, these parties stipulated in paragraph 11, not for an entire cessation of liability, as in paragraphs 3 and 12, but that the carrier which had the custody of this property pending

negotiation to its connecting carrier should, after the actual carriage should be furnished, and while, as a matter of fact, "the said property awaits further conveyance," should be subject to the limited liability of a warehouseman; that is, while the property is at the point of transhipment, either in the car awaiting its removal therefrom to be deposited in another car of a connecting carrier, or in the steamboat of a connecting carrier, or in the ocean steamship, or while it is upon the wharf awaiting the arrival of the ocean steamship to be further carried toward its ultimate destination, or while the carrier who has brought it there, completing its portion of the carriage, is making the proper notification record, and account of said property that that property shall be in its possession not with the unlimited, absolute liability of an insurer, but with the limited liability of a warehouseman.

The term "further conveyance" in the bill of lading has evident reference to something different from "delivery" in the third clause of the bill. It is the equivalent of carriage, and is as though the bill of lading read "while the property awaits further carriage." That is, the carriers from Temple, Texas, to New Orleans, each were entitled to the benefit of this clause when the property in the possession was awaiting "further carriage." It refers to the status of the property with reference to the physical act of carriage or transportation, not with respect to the legal relations of the property to one or the other of the parties successively called upon to engage in this physical act. This latter relation is fully determined by the question of whether there has been delivery or not made by one or the other, and this again may depend upon the question of notice from one to the other. But not

so with the question of "further conveyance," *i. e.*, transportation, carriage. Under the testimony in this case it is unquestioned that no act of further carriage or conveyance was to be made by the Texas and Pacific Railway Company. All that is suggested in the opinion of the Circuit Court of Appeals is that notice should be given to the connecting carrier. But that would not be an act of "conveyance," transportation, carriage of the property. The transportation was complete so far as the Texas and Pacific Railway Company was concerned. Its only further duty to the property was its delivery to the next carrier.

"Delivery": In contracts the transfer of the possession of a thing from one person to another.

Originally, delivery was a clear and unequivocal act of giving possession, accomplished by placing the subject to be transferred in the hands of the transferee or his avowed agent, or in their respective warehouses, vessels, carts and the like; but in modern times it is frequently symbolical, as by the delivery of the key to a room containing goods: (5 Johns., 335; 1 Yeates, 529; 2 Ves. Sen., 445; 1 East, 192; see, also, 7 East, 558; 3 B. & P., 233; 158 Mass., 592;) by marking timber on a wharf, or goods in a warehouse, or by separating and weighing or measuring them (2 Vt., 374; 40 N. J. L., 581; 69 Md., 537;) or otherwise constructive, as by the delivery of the part for the whole (23 Vt., 265; 9 Barb, 416; 11 Cush., 282; 39 Me., 496; 3 B. & P., 69). And see, as to what constitutes a delivery, 4 Mass., 661; 71 N. Y., 291; 89 Ill., 218; 89 Va., 1; 90 Tenn., 306; 74 Ia., 506; 1 Q. B., 582.

And the notice which the Circuit Court of Appeals dilates upon has relation not to any act of "further conveyance" of the property, but solely to the question of

its delivery either actual or constructive. The opinion utterly ignores the fundamental distinction in this bill of lading between "conveyance" and "delivery." They are separate, one must precede the other, and one begins when the other ends. In the case of delay at terminal points there is an intermediate stage, when the "conveyance" is ended, and the act of "delivery" not yet attended to. This, paragraph 11 is intended to define and govern.

The necessary effect of the construction contended for in the opinion of the Circuit Court of Appeals is to nullify this part of paragraph 11 of the bill of lading.

The Circuit Court of Appeals, in its opinion, cites in its support the case of McKinney vs. Jewett, 90 N. Y., 267. An examination of that case shows that it is clearly distinguishable from the case at bar. The language of the shipping bill or receipt in that case provided that the carrier should not be liable, as such, while the goods were "at any of their stations awaiting delivery," but during such period the carrier should be liable only as warehouseman. The facts in this case were that the hams, which were the subject of carriage in that case, arrived on Thursday. No notice of their arrival was given to the consignees although the consignees, through their cartman, inquired on Thursday and on Friday for the hams and was told that they had not arrived. As a matter of fact, they were then in the car which had arrived on Thursday and stood on the side track a short distance from the depot. On Saturday afternoon at half-past five o'clock notice of the arrival for the first time reached the consignees. The consignees having no time in which to remove their freight during the re-

maining hours of Saturday, waited over Sunday, and unloaded their hams on Monday, when they were found to have been seriously injured by heat and by the delay. The defendant relied upon the stipulation as to the reduction of liability under the terms of the shipping receipt that they should only be liable as warehousemen. The opinion, by FINCH, J., thus discusses this phase of that question:

"The defendant construes this stipulation to mean that from the moment of the arrival of the hams his liability as carrier ended, and from that time until the delivery on the following Monday he was responsible only as warehouseman. If that were so it would not excuse his negligence, but certainly property cannot be said to be 'awaiting delivery,' when its arrival is not only not announced, but actually denied; when its delivery is refused, and it is negligently withheld from the possession of the consignee. That was the case as to the carload of hams from their arrival on Thursday until at least the notice given on Saturday afternoon. It is to be observed that the stipulation depends upon two conditions; the property must be not only 'at the station' but also 'awaiting delivery.' This implies not only the arrival, but the completion of whatever on the part of the carrier is necessary to be done to leave the risk of further delay upon the consignee. The goods are 'awaiting delivery' only after the duty of the carrier is done, and he is entitled to remain passive 'awaiting' the action of the consignee."

* * * * * *

"It is said this construction nullifies the provision of the contract and leaves it nothing upon which to operate; that it must have some force, and it gets none if the common law liability remains unaffected. That rule properly applies only where two reasonable constructions are possible, and choice is to be made between them. In such event the law prefers the construction which gives the language effect. But no rule authorizes us to pervert the fair meaning of words, and to substitute, for something that is said, what is not said at all. We do not think the language of this shipping bill is doubtful or ambiguous. It means, as we

have stated, that after the goods have arrived, and the carrier has given notice to the consignee, at a time which furnishes reasonable opportunity for him to get them, then the carriers responsibility as such ends; and then, and not until then, are the goods "awaiting delivery." It is true, therefore, that the stipulation has little or no effect upon the character of the common law liability. It is possible that it has some, although very narrow and slight. The general rule holds the carrier as such until the end of a reasonable time for removal. It is possible that our construction would close his liability as carrier at the beginning of such reasonable time after notice. But we need not decide that here, for no facts in the case call for its determination.

"And that is the answer also to the further contention, that the trial court denied even this slender effect to the stipulation, and imposed the full common law liability. That is true, but we cannot see how it was at all material. There was no pretence that any of the injury to the hams occurred after the commencement of business hours on Monday morning. What the liability of the defendant was after that moment was of no consequence, and nothing in the case required its determination."

The damage to the hams was caused by the heat and the delay. The Court found that the carrier was guilty of negligence and that would create liability for the loss. The remarks of the Court, therefore, were unnecessary to the determination of the question of liability.

But the Circuit Court of Appeals construed the term "awaiting delivery" in a shipping bill, as synonomous with the term "awaits further conveyance." This ignores the essential differences between "conveyance" and "delivery." They are different acts and relate to difierent parts of the service. There could be no delivery to the consignee in the New York Case until there had been notice in some form to consignee. The element of notice had no connection

with the act of "conveyance" of the cotton. That might be entirely complete, regardless of notice.

Upon this question we submit that the Court clearly erred and the judgment directed should be set aside, there being no proof whatever of any negligence on the part of defendant.

II.

The contention of the defendant in error that the carriage of the cotton to Westwego was a deviation from the route designated in the bill of lading, is not well founded.

The contention was strongly urged in the lower Courts, and will doubtless be pressed in this Court, that the railway company cannot get the benefit of the stipulations of the bill of lading in view of the facts of this case.

The bill of lading provides that the cotton is "to be carried by the railway companies to the Port of New Orleans, La., and thence by Elder, Dempster & Co. S. S. line to the port of Bremen, Germany," etc. (Record, p. 79). At the time of the shipment and loss of the cotton the legal limits of the Port of New Orleans as a customs district, as defined by the Act of Congress, did not include Westwego (Record, p. 54). Indeed, the contention upon this branch of the case could not be more clearly stated than it is at this point in the record :

"MR. CLEVELAND: I suppose your proposition is that the Port of New Orleans is the actual place used as a harbor, irrespective entirely of custom?

"MR. TAGGART: In fact, yes.

"MR. CLEVELAND: Then do you concede that it was not within the Port of New Orleans, as defined by the Statutes of the United States in 1894—that is, that Westwego was not?

"MR. TAGGART: I concede this: that prior to March, 30, 1896, it was not within the designated limits of the port of entry, the customs district as defined by the Acts of Congress; that is, of course, subject to objection and exception as to its materiality."

The Circuit Court of Appeals overruled this contention of the defendant in error, saying:

"The plaintiff in error also made the point that by the bill of lading the cotton was to be delivered at the Port of New Orleans, and that, therefore, the defendant had no right to unload it at Westwego. It is true that Westwego was not, in 1894, within the boundaries of the Port of New Orleans, as defined in the Statute of the United States, but it was, so far as export cotton is concerned, that port in the well understood commercial and business sense, and was the port of New Orleans, when steamship companies rightfully expected to receive cotton from Texas for transportation to Europe. A kindred subject in regard to the limits of the port of New York was carefully considered in Devato v. 823 Barrels of Plumbago (D. C.), 20 Fed. Rep., 510; Sailing Ship Gorston Co. v. Hickie, 15 Q. B. Div., 580; Price v. Livingstone, 9 Q. B. Div., 679."

The same point was made, as the Court will recall, in the Clayton case, and it was not passed upon.

The rule invoked, that a carrier is liable, notwithstanding exemptions in the bill of lading, in case of deviation, is applicable only when such deviation has been from the *material* terms of contract.

The cases cited in the Courts below by the defendants in error sufficiently illustrate this distinction.

In Loomis vs. The Wabash, St. Louis and Pacific Railway Company (17 Missouri Appeals, 340), and in the *Devato case* (20 Federal Reporter, 510), the point named for delivery was the final destination of the goods, and an exact fulfillment of the terms of the contract might reasonably be deemed a matter of importance to the shipper or to his consignee.

In Graff vs. Blumer (9 Pennsylvania State, 114) the bill of lading provided that the goods were to be delivered not only, as stated in the plaintiff's brief (p. 40), "in Pittsburgh," but to "H. & P. Graff on presenting this receipt and payment of freight *at our warehouse* in Pittsburgh," and the fixing of the precise point of delivery may well have been for some specific purpose.

In the present case, however, the situation is quite different. New Orleans was not the destination of the cargo. Nothing was to be done with the cargo there except transfer it from the cars to the steamship for further transportation. At what precise point this was done was a matter of no importance to either shipper or consignee. The words "Port of New Orleans" were of no significance except as indicating the point of departure of the vessels of the designated steamship line. So long as the cotton was placed on one of the Elder-Dempster's Company's ships clearing from the port of New Orleans the material conditions of the contract were fulfilled, although the physical transfer of the cotton had been made from a point not within the boundaries of the legally created port.

As used in this bill of lading, therefore, the words "port of New Orleans" have no narrow or restricted meaning, but were simply to describe in general terms the point of trans-shipment. As was said by LUSH, J.,

in *Harrower vs. Hutchinson*, 38 L. J. (Q. B.), 185, they "must be read in a liberal sense, not merely as meaning those places which are technically and properly "known as ports, but all places where ships are accustomed to resort for the purpose of taking in "cargo. * * * The question whether it is a port "of loading is entirely irrespective of whether, by the "regulations of the country, a vessel can clear there "for this country. The definition that has been given "of a port is that it is a place at which ships arrive "for the purpose of loading their cargoes." That action was based on an insurance policy effected on goods at and from the port of Buenos Ayres and port or ports of lading in the Province of Buenos Ayres, to port or ports in the United Kingdom. The vessel having taken in part of her cargo at Buenos Ayres went to Lagunas de Padres to take in additional cargo. There was no artificial port or pier at the latter place, but vessels were required to anchor about a quarter of a mile from the shore and load by means of lighters. There was some little trade between Buenos Ayres and Lagunas, but none whatever between the latter place and Europe. A vessel bound for Europe and loading at Lagunas would be required to return to Buenos Ayres in order to get her clearance papers. It further appeared that the underwriters by whom the policy was issued had no knowledge whatever of the existence of such a place as Lagunas. It was the claim of the defendants that as a vessel would not have been allowed to go from Lagunas direct across the ocean it was not a port of loading within the meaning of the policy. This contention was overruled by the Court in the words above quoted.

In the case of Dock Company against Browne *et al.* (*a* B. & Ad., p. 43), we have a similar holding in the Court of King's Bench. The result of the decision is quite clearly stated in the marginal note, as follows :

"The port of Kingston-upon-Hull is mentioned in acts of parliament, charters and other documents, in two senses—first, according to the popular understanding as denoting a particular place ; and, secondly, in a larger acceptation, as comprising under one name a district of many places classed together for the purposes of the revenue, and of which Kingston-upon-Hull is the chief.

"The statute, 14 G., 3, c. 56, s. 42, which gives the Hull Dock Company a tonnage on ships coming into or going out of the harbour of Kingston-upon-Hull, or unlading or lading any of their cargo within the said port, must be construed as using the term "port" in the popular sense ; and not, therefore, as extending the burden of dock duties to places which, in point of local description, are without the port of Hull."

In Price vs. Livingstone (9 Q. B. D., 679) the question arose upon the construction of the terms of a charter party where the owners were entitled to an advance of one-third of the freight within eight days "from the final sailing of the vessel from her last port in the United Kingdom." The vessel was loaded at Penarth Dock, and was towed by a steam tug seven or eight miles, bringing her out about three miles into the Bristol channel. She there cast anchor, as the weather was threatening. While she was lying at anchor a storm broke her cables, and she ultimately ran ashore on Penarth beach, and the cargo was spoiled. The vessel had never been beyond the limits of the port of Cardiff as defined for fiscal purposes, but she had left what for commercial purposes is considered the port and had been out at sea. She went ashore within the limits of the port in

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its commercial sense. The owners sued for one-third of the freight, and the charterers resisted the claim on the ground that the vessel had never sailed from her last port in the United Kingdom. It was held, affirming the decision of LOPES, J., that the word "port" must be taken in its ordinary commercial sense, and that as the vessel had got out to sea without any intention of returning, she must be taken to have finally sailed from her last port, that her being driven back into it by the weather made no difference, and that one-third of the freight was payable.

JESSEL, M. R., passing on the question, says, among other things (p. 681):

"The word 'port' must be understood in its ordinary commercial sense. There are ports which, like the port of Cardiff, extend to miles for fiscal purposes, but they are not for commercial purposes to be treated as having that extent. This vessel was towed out to sea in the Bristol Channel, and had got seven or eight miles out of the port in its ordinary commercial sense."

In Sailing Ship "Garston" Co. vs. Hickie & Co. (15 Q. B. D., 580) it is held that the word "port" in a charter party is to be understood in its popular or business or commercial sense; it does not in such a document necessarily mean the port as defined for revenue or pilotage purposes.

This was an action brought to recover freight under the terms of a charter party which required freight to be paid "ten days after the final sailing of the vessel from her last port in Great Britain." In the opinion in this case, BRETT, M. R., discussing the meaning of the term "port" in the charter party, says:

"Therefore the word 'port' in a charter party does not necessarily mean an Act of Parliament pilotage port, or, which is the better word, pilotage district.

Therefore when you are trying to define the port with regard to which persons who enter into a charter party are contracting, you endeavor to find words which will shut out those things which you know they do not intend. What do they intend? They intend the port as commonly understood by all persons who are using it as a port, *i. e.*, for sailing to or from it with goods and merchandise. What persons are they? Shippers of goods, charterers of vessels and shipowners. What do all these persons in their ordinary language mean by a 'port'? What they understand by the word is the port in its ordinary sense, in its business sense, in its popular sense—*i. e.*, the popular sense of such persons. It is also the port in its commercial sense, for with them, business means commercial sense. Therefore, with the greatest deference to Mr. Justice WILLS, it seems to me that all these phrases are equally good, and that all in substance mean the same thing. He seems to have been inclined to substitute the words 'the legal port'; but with deference to him, in my opinion that would not do. The legal port may be fixed by an act of Parliament about which nobody knows anything. It must mean the port which such persons as I have mentioned would be dealing with, for the purpose of ships going to or from it carrying goods."

The argument was urged in the Courts below that it was intended by the shipper that he should have the benefit of such special protection from fire as would be afforded to him by the New Orleans Fire and Police Department, but this is fallacious. There is nothing in the record showing the legal limits of the port of New Orleans, and it cannot be assumed that they are co-terminous with the City of New Orleans proper, or those parts of it which have the benefit of police and fire protection. Doubtless there are many points within the legal limits of the port, and thus within the technical construction of the bill of lading contended for by the defendants in error, that are quite as remote as Westwego from the thickly settled

portions of the City. Had the theory now advanced been correct the shipper would have insisted on a bill of lading providing for trans-shipment, not in the "Port of New Orleans," but in the City of New Orleans, or at some particular pier or warehouse in that City.

But there is nothing upon which to found the claim of deviation, because the testimony shows that it was the general and established usage of the port for steamships to take delivery of export cotton at Westwego. Westwego was within the rule established by the authorities cited *ante*, a part of the commercial port of New Orleaas.

This abundantly appears from all the evidence in the case.

Mr. Le Blanc, agent of the Harrison Line of Steamships, testified (p. 26):

"We used to make engagements for cotton and when it came in we went there for it, but we had no other arrangements. Just like anybody else, we went to Westwego for it and everybody did; there was no special arrangement. * * * I should think the bulk of the cotton carried by the Harrison Line was received at other points than our own wharf. That custom was universal with the steamships landing here in New Orleans; that is, at the terminals of railways the steamship lines were all accustomed to receive cotton which was shipped over the various rail lines which was to go from the rail lines to the steamship lines. * * * The railway company at the point of shipment would make a through rate to the shipper in Liverpool, we will say, and that would be based upon a contract with the steamship company by which the steamship company would accept a certain proportion of that rate from the railway as its share of the carriage. Those are the kind of contracts or arrangements that I spoke of that were in force in 1894 between our line and the Texas and Pacific Railway Company, and it was in accordance with this custom, or an arrangement of that sort, that the reception of the cotton by the steamship lines was the terminus of the railway" (p. 27).

Mr. Warriner, agent of the Elder-Dempster Company Line, testified (p. 63):

"Q. After the building of the Westwego wharf it was customary, not only for your Steamship Line but for all other Steamship Companies to call at Westwego and get cotton? A. I suppose most of the lines did that; most of the lines went there.

"Q. And all export cotton that was required to be carried by rail came to the port of New Orleans and all that by the Elder-Dempster Line was delivered at Westwego, was it not, or substantially all, after this wharf was built, the cotton carried by the Texas & Pacific Railway Company? A. I do not know; I think there was a good deal carried that was delivered to the City front in New Orleans in the City.

"Q. I am speaking of export cotton for the Elder-Dempster Line? A. I should say most of it was delivered to Westwego.

"Q. But where there was a general contract for delivery at the port of New Orleans for cotton to be carried by the Elder-Dempster Line, Westwego was the point of delivery, was it not? A. Yes, sir."

Mr. W. J. Hammond, agent of the Hammond Line, testified (p. 58):

"Q. Now, then, that custom was about the delivery of cotton from the Texas & Pacific Railway Company here along the City front on this side—the New Orleans side—prior to the erection of the wharf; after the erection of the wharf at Westwego that was the recognized place of delivery for cotton, was it not? A. At Westwego—it was their terminal.

"Q. And the Steamship Line goes over there in order to get its cotton for export on its steamer? A. Oh, yes; they go there for a certain amount of cotton" (p. 61). * * *

"Q. After the erection of the dock it was recognized as commercially within the port of New Orleans—there were regular deliveries at Westwego? A. We called it New Orleans, although it was not officially New Orleans.

Q. And under the bills of lading for shipment by the Texas & Pacific it means New Orleans, and the Hammond and various lines of steamers received cotton continuously at Westwego, did they not? A. Yes, sir."

Mr. M. J. Sanders, agent of the West India and Pacific Steamship Company, testified:

"Q. Now after Westwego was opened then cotton shipped in that way (export cotton) was shipped to Westwego and there received by the steamship lines, was it not?

"A. As a rule, with the modification that I have already mentioned, that a certain quantity or number of bales must be there at one time for delivery" (p. 66).

Mr. Fornaris, agent of the French line, testified:

"Our line was accustomed to go to Westwego as well as to other wharves where freight was to be delivered, where it could get freight, whenever there was a sufficient quantity to justify our going there. Under a previous arrangement with the Texas & Pacific, we made an engagement with them that if they had so many bales we would go there to take them" (p. 76).

The fact that the Steamship Companies required that before going to Westwego there should be a certain minimum amount of cotton there ready for delivery, does not affect the question of the existence of a general custom or usage regulating shipments under a through bill of lading like the one in suit. It must as a rule have been a case that there was a sufficient amount of cotton ready to satisfy the requirements of the Steamship Companies, for the evidence is clear that practically all export cotton on through bills of lading was taken on board the steamers at Westwego, and only shipments for local points, or cotton shipped for foreign ports, on other than through bills of lading, were delivered in New Orleans proper.

Thus Mr. LeBlanc said (p. 30):

"I do not remember any shipments of the character I have described—through shipments—of cotton in 1894, where the cotton was delivered to our dock. Whatever shipments of cotton were made from our two

wharves in New Orleans were not exceptional shipments; they were smaller amounts for smaller roads and for spot shippers and for individual shippers."

Mr. Sanders said (p. 66):

"But I think that after the erection of the wharf at Westwego all cotton was loaded there—that is, all export cotton, so far as our lines were concerned. That is, the delivery of export cotton in the City of New Orleans along the front had about practically ceased."

Mr. Ross testified (p. 73):

"I know, however, that a large amount of export cotton, after the wharf at Westwego was built, was delivered to the steamship lines at Westwego.

"Q. And that the delivery of export cotton at any other point by the Texas and Pacific had almost entirely ceased, had it not. A. As far as direct arrangement between the railroad and ships are concerned.

"Q. As far as you know, the delivery of export cotton by the Texas and Pacific Railway at any other point had largely ceased, had it not? A. As far as any direct engagement with the Texas and Pacific Company on through bills of lading it did, but it did not cease as far as other export cotton was concerned."

There is no force in plaintiff's suggestion that because the shipment in this particular suit was only 200 bales it could not properly be delivered at Westwego under the arrangements between the railroad and the steamship company. No such narrow view is admissible under the conceded facts appearing here. The particular engagement of cotton, of which this shipment was a part, was for 1,000 bales (Plaintiff's Exhibit F, p. 95); and it further appears from the cotton reports offered in evidence by the defendants in error, that at the time when the 200 bales now in suit were received there were on hand at Westwego, also destined for Bremen, by Elder-Dempster Company's Line, over 3,000 bales of cotton (Record, p. 99. See, also, pp.

98, 100, 101, 102, 103 and 105. See, also, testimony of Wilkinson, p. 35; Perkins, p. 50).

Under these circumstances, the precise situation described by the shipping agents was presented; namely, that they would always go to Westwego to take export cotton, provided the shipment was of a sufficiently large quantity. The existence of the custom thus shown is sufficient justification for the delivery at Westwego. Under well-settled rules the fact that it may not have been known to the shipper (which, by the way, does not appear in this case) would not affect the question of the railway company's right to make such delivery.

In addition to the general recognition of Westwego by all the steamship lines going there for export cotton and making it the point of reception of such cotton from the Texas and Pacific Railway Company, under bills of lading of the form used in this case, there was express recognition of it as a part of the port of New Orleans by the State authorities. By Section 1681, Article 3, page 698, of the Statutes of Louisiana, a board of Harbor Masters was created to have jurisdiction over the movement of vessels in the port of New Orleans, with power to make regulations, collect harbor dues and to appoint deputies, etc. Under this statute the Board of Harbor Masters appointed a deputy to have charge upon the wharf at Westwego of the enforcement of their regulations, etc. They also adopted regulations governing the movement of vessels at the wharf and collected harbor dues from vessels going to Westwego, as in other parts of the port of New Orleans (Record, pp. 46-49).

In Hostetter vs. Park, 137 U. S., 30, certain merchandise was shipped from Pittsburgh on board a

barge, to be transported from Pittsburgh to New Orleans, and "to be delivered without delay in like good order at the port of New Orleans, Louisiana (the dangers of fire and unavoidable accidents excepted)." It appeared that when the tug having the barge in question, and other barges, in tow, had arrived safely at Mount Vernon, Indiana, and taken on board additional cargo, it left all of the other barges and went back up the Ohio River several miles with the barge in question, taking on additional cargo. Upon the return down the river an accident occurred, causing the loss of the cargo. The plaintiffs contended that this was a deviation, while the defendants claimed that it was a well-known custom for the owners of vessels to land their fleet at various points along the river, and there make a contract with shippers for the transportation of goods, and then detach from the fleet the barge or barges designated to receive such cargo, if it was not there, and send the barge or barges so designated to the place where the cargo might be stored, whether up, down, or across the river.

The Supreme Court held, BLATCHFORD, J., writing the opinion, that it was no deviation from the regular and usual course of the voyage to touch and stay at a port out of the course if such departure was within the usage of the trade, and said

"the same doctrine is applicable in the case of the bill of lading, even though the usage be not known to the particular shipper if it be established as a general usage."

III.

The judgment against the railway company in this case should be reversed and the cause remanded for a new trial.

Respectfully submitted,

RUSH TAGGART,

ARTHUR H. MASTER,

Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED
DEC 2 1901
JAMES H. MCKENNEY,
Clerk.

No. 77.
App't to Br. for P. C.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Dec. 2, 1901.

No. 77.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

EMIL REISS, JAMES EDWARD REISS, FREDERICK REISS and HENRY JACQUES REISS,
Defendants in Error.

Appendix to Brief of The Texas and Pacific Railway Company, Plaintiff in Error.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

I.

Remarks of Lacombe, J., in directing a verdict in favor of defendant on first trial, May 9, 1899.

BY THE COURT:

Very briefly I will state the method by which I arrive at my conclusion with regard to the bill of lading. The original liability of the common carrier that he shall respond as an insurer for property put in his hands, unless it is destroyed by the act of God, or public enemy, which originated many years ago, in what was then considered a sound public policy (and which public policy has still been persisted in in spite of many subsequent changes in the methods and circumstances of transportation) is an obligation which may, to a certain extent be relieved against by contract between the parties. The seeking of such relief is of course the basis of the various provisions in bills of lading. The Courts have held repeatedly that there are certain things the carrier cannot accomplish by any condition inserted in the bill of lading; and they have also held that there are other things that he may accomplish. In the particular case which we have in hand, undertaking to provide against the stringent liability of a common carrier, the carrier, or rather the successive carriers inserted certain conditions in the bill of lading and made them a part of the contract. They provided that all liability should terminate on the delivery of the property to the steamship, the steamship company, or on the steamship pier. Of course they had a right so to provide, and the law provided that much anyhow. Then they undertook to provide for a state of affairs where delivery to the steamship or the steamship company had not yet been fully accomplished. Thus we have in the third clause a provision that no carrier should be liable for loss or damage after the property is "ready for delivery to the next carrier," or its consignee. I doubt very much whether the carrier could make any such contract as that, or properly include any such condition, because it stipulates against his responding even for his own negligence; stipulates

against his responding for any loss or damage at all, no matter how incurred, after he has got the property stacked up and ready for delivery to the next carrier. However, it is not necessary to determine that question, because the carrier in this case has gone still further and provided for a case where not only has actual delivery not been accomplished, but where even actual tender of delivery to the next carrier has not yet been made. The eleventh clause provides that no carrier shall be liable in any other respect than as a warehouseman where the said property awaits further conveyance. In that clause there is no effort made to relieve him from all liability. The effort is to provide that, whereas he remains liable as a carrier so long as he is actually transporting the property and exposing it to all the vicissitudes to which property is exposed upon his road, weak bridges, misplaced switches, collisions, hot boxes, locomotive sparks and what not—remaining liable for all that, he simply stipulates that when he has reached the end of the transit and has got the property out loaded from the car on the resting place provided for it there, he shall not be liable except as a warehouseman. That is, he shall not be liable as an insurer but only for some failure of proper care in looking after the property. That is not an unreasonable stipulation. Of course the obligation of a carrier, as we look at it nowadays, seems to be a very onerous provision. He is required to respond as an insurer. It makes no difference if the fire, without his fault, caught premises next door to his and the wind swept it over to his premises, and the fire department was not able to stop it, he must respond all the same. It makes no difference if twenty or thirty men came there riotously and beat off his watchmen and burned the property up, the common carrier must still respond; and it is not unreasonable for him to relieve himself from liability as common carrier and to reduce his liability to that of warehouseman, when the characteristic functions which he discharges as common carrier have reached their conclusion. Therefore I see nothing unreasonable in this clause, and it seems to me that its natural interpretation is that it covers the condition of affairs when delivery not only has been completed—I mean delivery to the next carrier—but even prior to the time when delivery to the next carrier is actually proffered; when the property has been, by the first carrier, stacked up and in the position where he is about to deliver it, and all that awaits is the tender and put-

ting it into the hands of the next carrier. That leaves his liability in this case, as I understand it, the liability of a warehouseman.

As to the suggestion which is made here that there has been a divergence from the route stipulated in the bill of lading, upon the theory that the property was not carried to the port of New Orleans—upon the testimony as it stands I think that West Wego, within the meaning of this bill of lading, was a part of the port of New Orleans, commercially.

The question, therefore, only remains as to whether the testimony is sufficient to make out a case of lack of ordinary care on the part of the carrier, under all the circumstances, acting as warehouseman. Without going into the details of the testimony, it is sufficient to say I do not think that it does. There is some testimony here in regard to the apprehension of riotous disturbances, and the number of watchmen that were sent there from the detective agency, and it might be a question as to whether the company were reasonably prudent in the number of watchmen that were thus selected, if we had anything to indicate at all that the fire originated by reason of these disturbances. Then, on the other side, we have an engine on the dock there, some six hours before, and it was apparently in the habit of coming there every day, and if we had anything to connect the *locus* of the origin of the fire with the place where this locomotive was standing, very possibly there might be something in it; but there is a failure to connect the testimony which it is claimed shows neglect, with the subsequent catastrophe. I do not think, although the plaintiff has the burden of proof—and too heavy a burden should not be laid upon him where he is undertaking to show occurrences that took place at a location which is entirely within charge of the carrier, and about which he knows nothing—still at the same time he must go further than the plaintiff has in this case, certainly when testimony is available. Under the circumstances I think he has not made out a case sufficient to entitle him to a verdict.

II.

Opinion of Circuit Court of Appeals, December 7, 1899, reversing the judgment of the Circuit Court.

Reiss et al. v. Texas & Pacific Ry. Co., 98 Fed. Rep. 533.

SHIPMAN, C. J. The plaintiffs, who are cotton merchants in the city of Liverpool, and aliens, delivered on October 30, 1894, at Temple, in the state of Texas, to the defendant, a railroad corporation created by virtue of an act of congress, and a common carrier from places in Texas to New Orleans, 200 bales of cotton, to be carried by the defendant from Temple to the port of New Orleans, and thence by Elder, Dempster & Co.'s line of steamships to Bremen, Germany. The conditions of the bill of lading which was issued for this cotton were divided into two classes, one relating to the service until, and the other relating to the service after, delivery at the port of New Orleans. All the bales arrived a West Wego on November 6, 1894, and 160 bales were unloaded on the next day, and the remaining 40 were also unloaded, but the day of unloading does not appear. All the bales were placed on the defendant's wharf, 120 bales at one point, and each lot of 40 bales at separate and different points. All the cotton was destroyed by fire on the evening of November 12th. At this time the wharf was loaded to its full extent with cotton, there being on the wharf over 20,000 bales, and 206 cars containing 8,000 bales. West Wego is in the parish of Jefferson, on the west bank of the Mississippi, opposite the upper end of the city of New Orleans. Before the construction by the defendant of a wharf and terminals at this point, it delivered all export cotton at its freight depot and warehouse on the east side of the river, in New Orleans proper. The West Wego structure was completed in the early spring of 1893, and thereafter all export cotton coming from Texas was delivered to the steamship companies at West Wego, which was the port of New Orleans for export cotton in the popular business and commercial sense, though it was not included by statute of the United States in the customs district or port of entry of New Orleans until March 30, 1896. The conditions of the bill of lading which are important in this case " with respect to the service until delivery at the port of New Orleans " are as follows :

"(1) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damages thereto by causes beyond its control, or by floods, or by riots, quarantine, strikes, or stoppage of labor, or by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet, or decay, or from any cause if it be necessary or is usual to carry said property upon open cars."

"(3) No carrier shall be liable for loss or damage not occuring on its own road, or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee."

"(11) No carrier shall be liable for delay, nor in any other respect than as a warehouseman, while the said property awaits further conveyance; and, in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer of the ocean line above stated leaving after the arrival of said property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer.

"(12) This contract is executed and accomplished, and all liability hereunder terminates, on the delivery of the said property to the steamship, her master, agent or servants, or to the steamship company, or on the steamship pier at the said port; and the inland freight charges shall be a first lien, due and payable by the steamship company."

The defendant was in the habit in 1894 of making contracts with divers steamship companies, including Elder, Dempster & Co.'s line in New Orleans, by which they were to transport to European ports cotton received by them at the defendant's wharf at West Wego. The particular contract under which Elder, Dempster & Co. were to transport the plaintiff's bales was dated October 19th, 1894, and was in the form of a letter to the agents of the steamship company from the agent of the defendant, saying that he had engaged 1,000 bales of cotton for shipment by their line to Bremen at a specified rate. The course of business between the steamship lines and the defendant was stated in Texas & P. Ry. Co. vs. Clayton, 28 C. C. A. 142, 84 Fed., 305, and was as follows:

"This wharf was at the terminus of a branch of the defendant's line of railway on the bank of the Mississippi River, and was built out over the river far enough so that cars could be run upon the tracks in the rear of the wharf and unloaded, and vessels come to the front of the wharf and receive the freight thus unloaded. It was controlled exclusively by the defendant, and used by it for the temporary storage of freight of all kinds brought over its railway and awaiting delivery to the consignees or for transportation by vessels. * * * Upon the shipment of the cotton in Texas, bills of lading would be issued to the shipper. Thereupon the cotton would be loaded in cars of the defendant, and a waybill giving the number and initial of the car, the number and date of the bill of lading, the date of the shipment, the names of consignor and consignee, the number of bales forwarded on that particular waybill, the marks on the cotton, the weight, etc., would be given to the conductor of the train bringing the car to West Wego. Upon the receipt of the waybill and car at West Wego, a skeleton would be made out by the defendant's clerks at West Wego, for the purpose of unloading the car properly, containing the essential items of information covered by the waybill, and the date of the making of the skeleton. When this skeleton had been made out, and the car had been sidetracked at the rear of the wharf, the skeleton would be taken by the defendant's check clerk, and he would proceed with a gang of laborers to open the car. The cotton would then be taken from the car, examined to see that the marks corresponded with the items upon the skeleton, and deposited in one of the sheds upon the wharf designated by the check clerk, and the check clerk would mark upon the skeleton the location of the cotton The sheds were subdivided into fifteen sections, and the location of the cotton was left to the check clerk. The skeleton would then be transmitted to the general office of the defendant, and the defendant would make out a 'transfer sheet,' containing substantially the information contained in the waybill, and transmit the transfer sheet to the steamship line. The steamship line, upon receiving the transfer sheet, understood that cotton for their vessels was on the wharf at West Wego, and would collate the transfers relating to such cotton as

was destined by them for a particular vessel, return the transfer sheet to the defendant, and advise defendant what vessel would take the cotton. Thereafter the steamship company, when it was ready to take the cotton, would send the vessel, with their stevedores to the wharf, the defendant's clerk would go with the master of the vessel, and identify and count out the particular lots of cotton designated for his vessel, the master would O. K. them, and the stevedores would thereupon take the cotton and put it on board the ship. Before the cotton left the wharf, the defendant would obtain a receipt for it from the master of the ship."

No transfer sheets respecting the cotton in suit, and no notice of its arrival at West Wego, were ever sent to the steamship company. A practice has grown up since the fire for a vessel to receive cotton which had arrived in accordance with the bill of lading for which the ship had room, although the steamship company had not received transfer sheets; that is, to receive any cotton which entirely corresponded with the bills of lading for which it had room, and receipt for it. This cannot be stated as at any time a general usage. The case turned in the circuit court upon the construction of clause 11 of the bill of lading, and the circuit Judge was of opinion that the term "awaiting further conveyance" meant not only when the next carrier was about to take possession, but when the property had been unloaded from the cars, and placed in proper position for future transportation, although notice of arrival or tender of delivery has not been made. He therefore directed a verdict for the defendant, and to review the judgment which was entered upon the verdict this writ of error was taken.

The subject of the obligation of a carrier at common law towards property while it is in transportation to its ultimate destination, and is to be taken by a connecting carrier, was considered in Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. 318, 21 L. Ed. 297; Texas & P. Ry. Co. v. Clayton, 173 U. S., 348, 19 Sup. Ct. 421, 43 L. Ed. 725; *Id.*, 28 C. C. A., 142, 84 Fed., 305; and Goold v. Chapin, 20 N. Y., 259. In the first-named case it is said:

"In such cases it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line, and to deliver to the next carrier beyond; and that public

> policy requires that the rule should be enforced, and will not allow the carrier to escape responsibility at the end of his route without delivery or an attempt to deliver to the connecting carrier."

Furthermore, in the like absence of a special contract, it was said in the Clayton Case in this court:

> "Although the second carrier, after notice and a request to do so, has neglected for an unreasonable time to receive the goods, the first carrier must, to exonerate himself as an insurer, in some way clearly indicate his renunciation of the relation of carrier."

The mere unreasonable delay of the connecting carrier is not sufficient to convert the first carrier into a warehouseman. This renunciation is ordinarily shown by notice to the connecting carrier that the property will be kept or stored at its risk until compliance with the request to remove. Texas & P. Ry. Co. Cases, *supra*. This rule of law being admitted, it is said by the defendant that a special contract was clearly stated in its bill of lading, by which it became a warehouseman from the time that the cotton was unladen and piled upon the wharf to await cartage to the steamship. It is not claimed that the facts bring the carrier's liability within clause 3 of the bill of lading, which says that the liability shall end after the property "is ready for delivery" to the next carrier, for it is conceded that the goods are not awaiting delivery before any notification of their arrival to the connecting carrier. McKinney v. Jewett, 90 N. Y. 267. It is, however, insisted that the fair construction of clause 11 is that, when the act of transportation of the cotton to the wharf at West Wego has been accomplished, and it has been stacked on the wharf, and "is awaiting further action in the way of notification and advice to the succeeding carrier," it awaits further conveyance. By this construction the parties substituted an immediate cessation of the liability of a carrier, and the assumption of the liability of a warehouseman for the liability imposed by the common law, and doubtless they were at liberty to make a contract of limitation which will be enforced if the language of the bill of lading clearly indicates that such was their intention. In order to justify the defendant's construction, the claimed extent of the departure from the

implied contract of the common law must clearly appear in the language which is used in the special contract. The clause, "no carrier shall be liable for delay," when applied to the facts in this case, meant that the defendant should not be liable for the delay of the steamship company, but delay would not occur until it knew or had heard of the time of arrival of the cotton. The same idea of notification to the connecting line must also run through the entire paragraph, and, while the term "awaiting further conveyance" literally means "awaiting the time when the next carrier shall take the property in hand," it seems improbable that it was the intent of the language that the liability of the carrier should terminate upon the deposit of the property upon the wharf. The language is too indefinite to support the conclusion that notice to the connecting line was not a prerequisite to the change of liability to that of a warehouseman. It may well be that such change would take place when the property was awaiting conveyance by the connecting line which had been notified to receive and convey, but until then it is not awaiting conveyance; it is awaiting the action of the first carrier. The term must mean awaiting conveyance by the person upon whom the duty of conveyance devolved, and no such duty devolved until notice of the arrival of the property had been given. The provisions of the bill of lading in Draper v. Canal Co., 118 N. Y. 118, 23 N. E., 131, which was construed to free the carrier from liability from the time the property reached the point of destination, were far more definite than those in this case. In the direction of a verdict for the defendant, when no notice of the arrival of the property had been given to the next carrier, or had been received by it, we think that error was committed.

The plaintiff in error also made the point that by the bill of lading the cotton was to be delivered at the port of New Orleans, and that, therefore, the defendant had no right to unload it at West Wego. It is true that West Wego was not, in 1894, within the boundaries of the port of New Orleans, as defined in the statute of the United States, but it was, so far as export cotton is concerned, that port in the well understood commercial and business sense, and was the part of the port of New Orleans where steamship companies rightfully expected to receive cotton from Texas for transportation to Europe. A kindred subject in regard to the limtts of the port of New York was carefully considered in Devato v. 823 Barrels of Plumbago (D. C.) 20 Fed., 510; Sailing Ship Garston Co. v. Hickie, 15 Q. B. Div., 580; Price v. Livingstone 9 Q. B. Div.

679. If the circuit judge should be of opinion that the liability of the defendant was that of a warehouseman, the plaintiff asked to go to the jury upon the question of negligence of the defendant as a warehouseman in not taking larger precautions against fire when an accidental fire might reasonably have been expected. Inasmuch as we are of opinion that the defendant was not a warehouseman, any expressions upon the subject of neglect would be *obiter*. The judgment of the circuit court is reversed with the costs of this court, and the case is remanded to that court for a new trial.

No. 77.

Brf. of Cleveland for D'ts

Office Supreme Court U.S.
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Clerk.

Filed Nov. 11, 1901.

Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 77.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

EMIL REISS, JAMES EDWARD REISS, FREDERICK REISS AND HENRY JACQUES REISS,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

FREDERIC E. MYGATT,
GEORGE RICHARDS,
TREADWELL CLEVELAND,
Counsel for Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE TEXAS AND PACIFIC RAILWAY COMPANY, *Plaintiff in Error,* *against* EMIL REISS, JAMES EDWARD REISS, FREDERICK REISS and HENRY JACQUES REISS, *Defendants in Error.*	No. 77.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

Statement.

This action was brought by the defendants in error, the plaintiffs in the Circuit Court, and hereinafter called the plaintiffs, against the plaintiff in error, the Railway Company, hereinafter called the defendant, to recover the value of two hundred bales of cotton, delivered to the defendant as a common carrier, and destroyed, while in its possession, by the burning of its wharf at West Wego, in the State of Louisiana, on November 12, 1894.

The defendant, in its answer, admitted the receipt of the cotton in suit, and its destruction by fire at West Wego, at the time alleged, but denied that

the cotton was then in its possession as a common carrier.

The case has been tried twice. On the first trial a verdict was directed in favor of the defendant (Lacombe, *J.*).

On appeal by the plaintiffs to the Circuit Court of Appeals, the judgment rendered on such verdict was reversed (98 Fed. Rep., 533).

Upon the second trial the Circuit Judge (Lacombe, *J.*) directed a verdict for the plaintiffs in accordance with the said decision of the Circuit Court of Appeals. The judgment rendered on that verdict was affirmed, on its former opinion, when the case again came up before the Circuit Court of Appeals (99 Fed. Rep., 1006), and from the judgment entered upon that decision this writ of error has been taken by the defendant.

The transcript of record herein, being of the proceedings on the second trial only, does not contain the opinion of the Circuit Court of Appeals rendered on the first appeal, but its material portions are quoted herein.

On both trials of this action, and also before the Circuit Court of Appeals, it was contended by the plaintiffs that taking this cotton to West Wego constituted a deviation which operated to withdraw from the defendant the benefit of any exemptions from its common law liability contained in its bill of lading, and a large part of the evidence in the transcript of record herein was presented upon that point.

This question of deviation, affecting all other cases now pending in the Second Circuit, arising out of this fire, is not argued in this brief, as the evidence on this point is much fuller in the case of Marande and others, plaintiffs in error, against the Texas and Pacific Railway Company, defendant in error, No. 86 upon the present calendar.

The first of this series of cases to reach this Court was that of Texas & Pacific Railway Company *vs.*

Clayton, 173 U. S., 348. In that case, notwithstanding the provision in the bill of lading that in case of loss, that carrier alone should be liable in whose custody the goods were at the time of the loss, and the fact that the Railway Company had the cotton in its exclusive possession and care, on its wharf, it was contended that the cotton had been delivered by the Railway Company to the Steamship Company. This contention was, however, unanimously rejected by this Court and the defendant held liable.

No question of delivery, either actual or constructive, is raised by this appeal, the only contention of the defendant being that under the bill of lading in suit, the cotton "was awaiting further conveyance"; that the liability of the defendant was thus that of warehouseman only, and, no negligence having been proved, no recovery can be had.

The facts concerning the care and custody of the cotton at Westwego and the methods pursued between the Railway Company and the Steamship Company in relation to the delivery there by one carrier to the other are stated quite fully in the *Clayton* case (*supra*).

Two matters contained in that statement should, however, be now noticed.

Speaking of a transfer sheet (in substance, the notice of arrival), this Court there said:

> * * * "which being at once transmitted to the Steamship Company, or its agents, was a notification understood by the Steamship Company's agents that cotton for their line was on the wharf at Westwego ready for them to come and take away."

The use of the words, "at once," is inaccurate. In this case, the cotton in suit arrived at Westwego on November 6th and was unloaded on November 7th, but no transfer sheet or other notice of arrival was sent to the Steamship Company before the fire (p. 19).

Again the Court, in the *Clayton* case, says:

> "The stevedore and all men employed in loading the vessel were wholly in the employ of the Steamship Company."

This is not in accordance with the testimony in this case of Miller, the general freight agent, who testified as follows:

> "After our receipt from the Steamship Company of these transfer slips with marks of lots of cotton upon them, if it should be necessary to get out the cotton mentioned in them, that would be attended to by some of the employees at Westwego, the railway employees at Westwego, as to locating the cotton and getting it out. It was not necessary to get it out at all times. It was on the wharf. It was all over the wharf. It was usually stored, and inside of the railway track toward the land. I don't know that I issued any specific orders to any one in respect to getting out that cotton. It was understood that we would get out cotton when necessary to do it. By 'getting out cotton,' I mean trucking it out from where it was originally stored on the wharf, out, say in front or, when enough in front, to enable the steamship people to get it out without having to go around other piles of the cotton. When that was done at all it was usually done after the receipt of these transfer slips from the Steamship Company.
>
> Q. Was it usually done?
>
> A. That would depend on the location of the cotton on the wharf. In some instances it was done and in some instances it was not done. I do not mean, necessarily, that before the receipt of the transfer slips from the Steamship Company, the cotton that was destined for a steamer was put between the sheds and the river; I simply mean that if cotton which Elder, Dempster & Company, for instance, sent a steamer there to get, if it was where they could get at that cotton, if there was no obstruction of any consequence between where this cotton was stored, that they

went there to get, and the ship's side, that, in that case, we had nothing to do with getting it out; they took it from where it was located" (p. 13).

The bill of lading in the *Clayton* case contained this clause:

> "In case of any loss, detriment or damage done to or sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of such damage, detriment or loss."

A similar provision, though not so elaborately expressed, is contained in paragraph three of the bill of lading in this case. All the provisions in this Bill of Lading which are material to this controversy are as follows:

"Conditions.

WITH RESPECT TO THE SERVICE UNTIL DELIVERY AT THE PORT OF NEW ORLEANS, LA., IT IS AGREED THAT

> 3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. * * *
>
> 11. No carrier shall be liable for delay, nor in any other respect than as warehouseman, while the said property awaits further conveyance, and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer of the ocean line above stated, leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer.

> 12. This contract is executed and accomplished, and all liability hereunder terminates on the delivery of the said property to the steamship, her master, agent or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien due and payable by the steamship company" (pp. 80, 81).

In no part of these "conditions with respect to the service until the delivery at the port of New Orleans, La.," is there any mention of the word "FIRE."

In the conditions "with respect to the service *after* delivery at the port of New Orleans, La.," this most frequent cause of loss is very emphatically guarded against.

The Bill of Lading provides:

> It is agreed that * * * That the carrier shall not be liable for loss or damage occasioned by fire from any cause or whereso-ever occurring (p. 82).
>
> IX.—Also, that merchandise on wharf awaiting shipment or delivery be at shipper's risk of loss or damage by fire or flood, not happening through the fault or negligence of the owner, master, agent or manager of the vessel * * * (p. 83).

The contract between these carriers as to delivery by one to the other provides for

> "Delivery unrestricted" (p. 95).

That is, the Railway Company had the right to deliver, as the Steamship Company had the right to decline or to accept delivery, at any time during the cotton season.

This contract was wholly unknown to the shipper. The only reference to it in the bill of lading is "T. & P., No. 69" (p. 79).

It would appear that the cotton in suit was shipped under some special arrangement as to quick

transportation. There is no mention of this on the bill of lading, but on the face and endorsement of the way bill from Temple, Texas, where the cotton was shipped, are the words:

"Time freight; hurry through" (pp. 87, 88).

A futile attempt was made in the Court below to show that the ordinary, usual course of business between these two carriers was not as stated by this Court in the *Clayton* case, and that cotton was regularly shipped on steamships without any prior notice of arrival of such cotton at Westwego having been sent by the Railway Company to the Steamship Company.

The testimony to support this contention, however, simply relates to occasional occurrences, and to the time when a vessel had actually arrived at New Orleans and was proceeding to Westwego or was at Westwego loading. At such times it would appear that occasional telephonic communications were had between Wilkinson, who was the dock superintendent, and the ship owners relating to the ship taking more cotton than was mentioned on the transfer sheets which had then been sent by the Railway Company to the Steamship Company and returned by the Steamship Company. But this method especially related to shipments of the whole of one lot of cotton bearing one mark, or to one or two instances, where it was found that the vessel could take more cotton than was expected. The whole testimony shows, beyond contradiction, that the ordinary, usual method was, as stated by the Court in the *Clayton* case; and in this case Miller, who was the general freight agent and had superintending charge of the whole matter, says (p. 11): "That was our regular recognized course," namely, giving the Steamship Company notice of arrival of certain lots of cotton, the Steamship Company then returning these transfer sheets, showing what cotton they would be ready to take delivery of.

The Steamship Company did not otherwise know of the existence or the arrival of the cotton; it was only after a vessel had arrived at the dock at West Wego and the Steamship Company was informed that certain cotton was there, that any other method than that of the sending of the transfer sheets and their return with a direction by the Steamship Company to deliver designated cotton to a ship, was ever used.

First Point.

The duty of the defendant as to the cotton in suit did not end with the mere unloading thereof upon its wharf at West Wego, and NO NOTICE OF THE ARRIVAL OF THIS COTTON HAVING BEEN GIVEN TO THE NEXT CARRIER, *it was not "awaiting further conveyance" in the sense contemplated by the bill of lading. The liability of the defendant had not changed from that of carrier to that of warehouseman.*

The opinion of the Circuit Court of Appeals, after stating the facts, is as follows:

> "No transfer sheets respecting the cotton in suit, and no notice of its arrival at West Wego, were ever sent to the steamship company. A practice has grown up since the fire for a vessel to receive cotton which had arrived in accordance with the bill of lading for which the ship had room, although the steamship company had not received transfer sheets; that is, to receive any cotton which entirely corresponded with the bills of lading for which it had room and receipt for it. This cannot be stated as at any time a general usage. The case turned in the Circuit Court upon the construction of clause 11 of the bill of lading, and the Circuit Judge was of opinion that the term 'awaiting further conveyance' meant not only when the next carrier was about to take possession, but

when the property had been unloaded from the cars and placed in proper position for future transportation, although notice of arrival or tender of delivery has not been made. He therefore directed a verdict for the defendant and to review the judgment which was entered upon the verdict this writ of error was taken.

The subject of the obligation of a carrier, at common law, towards property while it is in transportation to its ultimate destination and is to be taken by a connecting carrier was considered in Michigan Cent. R. Co. *v.* Mineral Springs Mfg. Co., 16 Wall, 'and other cases.' In the first named of which it is said:

> 'In such cases it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line and to deliver to the next carrier beyond; and that public policy requires that the rule should be enforced and will not allow the carrier to escape responsibility at the end of his route without delivery or an attempt to deliver to the conecting carrier.'

Furthermore, in the absence of a special contract, it was said in the Clayton case in this court:

> 'Although the second carrier after notice and a request to do so has neglected for an unreasonable time to receive the goods, the first carrier must, to exonerate himself as an insurer, in some way clearly indicate his renunciation of the relation of carrier.'

The mere unreasonable delay of the connecting carrier is not sufficient to convert the first carrier into a warehouseman. This renunciation is ordinarily shown by notice to the connecting carrier that the property will be kept or stored at its risk until compliance with the request to remove (Texas & P. Ry. Co. cases, *supra*). This rule of law being admitted, it is said by the defendant that a special contract was clearly stated in its bill of lading, by which it became a warehouse man from the time that the cotton was unladen and piled upon the wharf to await cartage to the steamship. It is not claimed that the facts bring the carrier's liability within

clause 3 of the bill of lading, which says that the liability shall end after the property 'is ready for delivery' to the next carrier, for it is conceded that the goods are not awaiting delivery before any notification of their arrival to the connecting carrier (McKinney *v.* Jewett, 90 N. Y., 267). It is, however, insisted that the fair construction of clause 11 is that, when the act of transportation of the cotton to the wharf at West Wego has been accomplished, and it has been stacked on the wharf, and 'is awaiting further action in the way of notification and advice to the succeeding carrier,' it awaits further conveyance. By this construction the parties substituted an immediate cessation of the liability of a carrier, and the assumption of the liability of warehouseman for the liability imposed by the common law, and doubtless they were at liberty to make a contract of limitation, which will be enforced if the language of the bill of lading clearly indicates that such was their intention. In order to justify the defendant's construction, the claimed extent of the departure from the implied contract of the common law must clearly appear in the language which is used in the special contract. The clause 'no carrier shall be liable for delay,' when applied to the facts in this case, meant that the defendant should not be liable for the delay of the steamship company, but delay would not occur until it knew or had heard of the time of the arrival of the cotton. The same idea of notification to the connecting line must also run through the entire paragraph, and while the term 'awaiting further conveyance' literally means 'awaiting the time when the next carrier shall take the property in hand,' it seems improbable that it was the intent of the language that the liability of the carrier should terminate upon the deposit of the property upon the wharf. The language is too indefinite to support the conclusion that notice to the connecting carrier was not a prerequisite to the change of liability to that of a warehouseman. It may well be that such change would take place when the property was awaiting conveyance by the connecting line which

> had been notified to receive and convey, but until then *it is not awaiting conveyance; it is awaiting the action of the first carrier.* The term must mean awaiting conveyance by the person upon whom the duty of conveyance devolved, and no such duty devolved until notice of the arrival of the property had been given" (98 F. R., 533).

The plaintiffs might well leave their case in the hands of this Court, on this clear and satisfactory opinion of the Court below.

The conclusion that until notice of the arrival of this cotton had been given by this defendant to the next carrier

> "*it is not awaiting conveyance; it is awaiting the action of the first carrier,*"

cannot, we submit, be successfully controverted.

We may, however, make the following additional suggestions:

A.

The bill of lading upon its face shows that it is the result of great deliberation and care.

It is headed "Export bill of lading approved by the permanent committee on uniform bill of lading to take effect July 1, 1893." It is long and intricate, and full of exceptions, conditions and attempts to evade or limit liability.

Although, as this Court has very recently said, restrictions upon the liability of a common carrier contained in a bill of lading

> "*ought not to be wholly frittered away by an adherence to the letter of the contract in obviovs disregard of its intent and spirit.*"

There is, nevertheless,

> "*no doubt of the general proposition that restrictions upon the liability of a common carrier inserted by him in the bill of lading for his own benefit and in language chosen by himself, must be narrowly construed.*"
>
> *Queen of the Pacific*, 180 U. S., 52, 57.

We submit that to such a bill of lading as this, the result of the deliberations of a committee of carriers formed for the purpose of its preparation, this rule of law is especially applicable.

We are not then dealing with the question of a broad, loose, liberal interpretation of this contract, but with the question of what these terms strictly construed mean.

B.

"Await" is the state of waiting. The action of what carrier was this cotton awaiting? Primarily the action of the first carrier until all the duty of the first carrier was performed. And what clause is there in this bill of lading that can relieve the carrier of the well settled duty of giving notice to the connecting carrier? And how could this property be said to be awaiting conveyance by the succeeding carrier until such succeeding carrier has notice of its arrival at the point where such succeeding carrier is expected to commence such further conveyance?

We are not called upon in this case to determine what would be the proper interpretation of the words "while the property awaits further conveyance" under other facts, nor are we called upon to indulge our imagination as to what certain other clauses in this bill of lading might mean under certain other hypothetical states of fact. There is this single narrow question to be determined, and we have never been able to see how the railway carrier, under any reasonably strict interpretation of the bill of lading, can hope to escape from the conclusion that this property was *not* awaiting further conveyance, it not having taken the first step to set the further conveyer in motion.

The principle that the liability of this defendant was that of an insurer until it had carried this cotton to the port of New Orleans and there delivered it to the next carrier, unless such liability was altered by

the terms of the bill of lading, needs no authority to support it.

It is likewise well settled that, in the absence of an express stipulation, the duty of an intermediate carrier is not ended by the mere unloading of goods at the terminus of its road, unaccompanied by any delivery or tender of delivery to the next carrier.

Says Judge Cooley, in *Condon* v. *Marquette H. & O. R. Co.*, 55 *Mich.*, 218; 18 *Am. & Eng. R. R. Cases*, 574:

> "The duty of one [connecting carrier] is not discharged until it has been imposed upon the succeeding carrier, and this is not done until there is delivery of the goods, or at least such a notification to the succeeding carrier as, according to the course of the business, is equivalent to a tender of delivery. There is nothing in this which is burdensome to the carrier, for this is the customary method in which the business is done, and the rule only requires that the customary method shall be pursued without unreasonable delay or negligence. * * * We are not ready to assent to the doctrine that a railroad company, as to goods transported by it, ceases to be carrier the moment the goods are received at its warehouse. We do not think this is the law' or that it ought to be."

By the New York Court of Appeals it is said:

> The carrier's obligation is, "to carry the goods safely to the end of their road, and deliver them to the next carrier on the route beyond. A carrier, in such case, does not release himself from liability by simply unloading the goods at the end of his route, and placing them in his own storehouse, without delivery or notice to, or any attempt to deliver to, the next carrier."
>
> McDonald *vs.* Western R. Co., 34 N. Y., 497, at p. 500.

Applying these principles to the case at bar, it is apparent that unless defendant's common law obligation to carry and deliver, was altered by the clear

purport of the terms of the bill of lading, strictly construed, it was liable for the loss, no delivery having been made.

What, then, is the effect of clause 11 in this regard? Does it operate as the Railway Company contends, to change the liability of this defendant *the moment the goods are unloaded upon its wharf?*

This paragraph consists of one sentence only, and its natural, obvious, reasonable construction is, that it applies to a case when a duty resting upon the steamship company has not been performed. The single clause "no carrier shall be liable * * * in any other respect than as warehousemen while the said property awaits further conveyance" is not to be wrenched from its surroundings, but is to be construed as it is written, and the whole paragraph, being one sentence, must be considered to arrive at a true meaning of any of its parts. All of its parts are evidently intended to apply to a class of facts or circumstances constituting a delay of the Steamship Company, where the Railway Company has done its whole duty, and where, having done that duty, there is some delay on the part of the Steamship Company in the performance of some obligation resting upon it not to delay, but to take up and perform its part of the contract.

The whole scope of the eleventh paragraph contemplates not only the unloading of the cotton, *but the giving of a notice of arrival* to the next carrier. The cotton could not go on the next steamer, as provided in this clause, unless it was delivered to such steamer or a notice of its arrival was given to the Steamship Company, so that such connecting carrier might send to the Railway Company and take it.

Concerning the cotton in suit, however,

NO NOTIFICATION WHATEVER HAD BEEN GIVEN BY THE DEFENDANT TO THE NEXT CARRIER (fol. 31).

During the whole of the time that the cotton remained on the dock in the sole care and custody of the defendant, from November 7th until November

12th, when it was destroyed by fire, *the defendant had made no attempt to deliver it to the next carrier, and had not even notified it, according to the "regular recognized course" of business, that the cotton was there.*

In the case of McKinney *v.* Jewett, 90 N. Y., 267, the Court was construing a clause in a shipping receipt which, as stated by the Court, "provided in substance that the carrier should not be liable as such while the goods were 'at any of their stations awaiting delivery' to the consignee; and that during such period the carrier should be liable only as warehouseman," and after stating the facts the Court says:

> "The goods are 'awaiting delivery' only after the duty of the carrier is done and he is entitled to remain passive 'awaiting' the action of the consignee * * * but no rule authorizes us to pervert the fair meaning of words and to substitute for something that is said, what is not said at all. We do not think that the language of this shipping bill is doubtful or ambiguous; it means as we have stated that after the goods have arrived and the carrier has given notice to the consignee at the time which furnishes reasonable opportunity for him to get them, then the carrier's responsibility as such ends, and then and not until then are the goods 'awaiting delivery.'"

As was well said by the Circuit Court of Appeals:

> "In order to justify the defendant's construction, the claimed extent of the departure from the implied contract of the common law must clearly appear in the language which is used in the special contract."

And in the special contract under consideration

> "The language is too indefinite to support the conclusion that notice to the connecting carrier was not a prerequisite to the change of liability to that of warehouseman."

C.

The construction contended for by the defendant is most fanciful and unreasonable. If the cotton had been unloaded an hour before the fire, the defendant claims it would have been "awaiting further conveyance," and it is driven to admit that such construction would also be as applicable to a state of facts between two railway carriers at the terminus of the line of one and the commencement of the line of the other, and is forced to contend that had the cotton arrived in cars at the end of the line of one railway carrier ready to be further conveyed by the locomotive of the succeeding carrier, the cotton in the cars on the track of the first railway would have been awaiting further conveyance, and the liability of such carrier would have been that of warehouseman. Is such an interpretation reasonable? Is it otherwise than forced, strained, devised to meet the exigency of the situation?

D.

But we must not overlook any part of the situation. It needs no authority to support the position that these shippers had the right to expect that the cotton would be subject to only the reasonable, ordinary delays and exigencies of the usual course of transportation.

In this case there was a radical departure from this course, and this may account for the neglect of the defendant to give the Steamship Company any notice of the arrival of the cotton.

This cotton, by the secret contract between these two carriers, was to be delivered and taken not in the usual course of trade, but whenever they pleased. As far as the Steamship Company was concerned, it was under no obligation whatever to carry this cotton in the usual course of transportation or to go for it to West Wego within any reasonable time, even if the Railway Company had given notice of arrival. Had the Railway Company even actually tendered delivery the Steamship Company

was under no obligation to accept delivery. This situation arose by reason of this secret contract. All restrictions of the law as to notice and obligations to take, were, *as between these two carriers*, swept away by the language of this extraordinary secret contract, "delivery unrestricted."

Under these circumstances it would be most unreasonable to hold that the Railway Company immediately upon the unloading of the cotton on its dock and while it was awaiting its convenience as to giving notice of arrival, was turned into a warehouseman.

E.

Still another departure from the usual course of trade exists in this cause.

In the brief in the Marande case (No. 86), we have stated our contention as to the carriage of this cotton to Westwego being such a deviation as avoided all the limitations of liability contained in the bill of lading; but whether such performance by the Railway Company is such a deviation or not, it was, we submit, as far as this shipment of 200 bales of cotton was concerned, a deviation which avoided the limitation of "awaiting further conveyance," for it is undisputed that no ship of the Elder Dempster line would go to "Westwego for less than 2,000 bales."

As appears from the map, Plaintiffs' Exhibit G (between pp. 84 and 85), West Wego was in the Parish of Jefferson, across the river from the extreme upper end of the City of New Orleans. The dock and elevator of this defendant, which were all there was at West Wego in 1894 (the year of the fire) were not completed until the spring of 1893 (Miller, p. 9). They were built by the defendant, and were at all times under its absolute and complete control (Le Blanc, p. 27; Wilkinson, p. 43).

Prior to the building of this dock at West Wego in 1893 there was nothing there except the levee, and all of the cotton carried by this defendant was delivered by it to steamships in New Orleans on the

New Orleans side of the river (Miller, p. 9; Le Blanc, p. 27, and Warriner, p. 31).

But after the creation of the dock at West Wego various lines of steamships went there *under special arrangement* to receive cotton.

The testimony as to the arrangements under which the various steamship lines would send their vessels to West Wego differs only in regard to the number of bales which they would go there for.

Mr. Le Blanc, the agent of the Harrison Line, says:

> "We wouldn't go there for less than 1,000 or 1,500 bales" (p. 27).

Mr. Hammond, of the Hammond Line, says:

> "It was always understood we should not go there for less than 1,000 bales on account of extra cost of towage involved and the loss of time" (p. 57).

Mr. Warriner, the agent of the Elder Dempster Line, the line which was to carry the cotton in suit, says:

> "We would not send a ship [there] for less than 2,000 bales or so, so as to keep us working at least a whole day" (p. 61).

Mr. Sanders, the agent of the West India and Pacific Steamship Company, says:

> "We had a general understanding that we would not send the vessels to West Wego unless there was a certain quantity of cotton ready for delivery to us at one time; that quantity I believe was fixed at 1,500 to 3,000 bales, and we would not send our vessels for a smaller quantity than say, 2,000 bales" (p. 66).

Mr. Ross, a member of the firm of Ross, Howe & Morrow, steamship agents at New Orleans, says:

> "The minimum amount for which I would go to West Wego according to my recollection

was probably in the neighborhood of two thousand bales, something of that sort" (p. 71).

Mr. Fornaris, the agent of the French line, says:

He would not send a vessel over there for less than one thousand bales (p. 75).

This testimony helps to explain why this secret contract concerning delivery was entered into; a contract which gave the right to the Steamship Company to take delivery when it chose.

The Steamship Company, as it would not send a ship to Westwego for less than 2,000 bales of cotton, could not, of course, be bound by the usual obligations of the law as to taking delivery of small lots of cotton from the Railway Company at Westwego in any reasonable time after its arrival there, and it was essential for the Steamship Company, as the Railway Company was to set out the cotton at Westwego instead of taking it into the City of New Orleans, where, always prior to 1893 it had delivered cotton to steamship companies, to have absolute freedom as to taking delivery at Westwego.

At Westwego there could thus have been no "awaiting further conveyance" by the Steamship Company, in the ordinary, reasonable sense of the term as contained in this bill of lading, and the secret contract, and the practice under it, prohibits, as we submit, this defendant from claiming the benefit of the restricted liability under the 11th clause; its whole spirit, as well as the letter of it, was absolutely violated.

F.

The clause as to delivery contained in paragraph 3, is clearly void. It is:

> "*No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after such property is ready for delivery to the next carrier or to consignee.*"

By this clause the carrier is exempted from every loss when the property is said to be ready for delivery, including losses arising from its own negligence. It needs surely no authority to establish the invalidity of this proposition, and we are at a loss to see how even this defendant can pretend, since all liability for any loss or damage is restricted to that carrier upon whose road, or on whose portion of the through route such loss or damage occurs, that after the Railway Company had property ready for delivery, the shipper was absolutely precluded from recovering for loss or damage from either the Railway Company or the Steamship Company.

"Ready for delivery" must also mean ready for delivery in the ordinary course of transportation. But there is no such course here. The secret contract between those carriers as to delivery, precludes the possibility of the usual course of delivery being followed.

G.

Clause 12th has absolutely no application to the questions here discussed.

The contention that the dock of the Railway Company at Westwego, which was a dock owned, occupied and under the exclusive care and control of the Railway Company, upon which no one could go without the consent of the Railway Company, and from which no one could remove any property without the receipt of the Railway Company, was the Steamship Pier in the sense of the 12th clause of the bill of lading, is a contention so obviously at war with all the facts of the case, that it needs no discussion at this bar.

H.

Nor is it necessary in order to have a correct view of the non-applicability of the words "awaiting further conveyance" as contained in the 11th clause of this bill of lading to the facts in the case at bar, to be able to infallibly imagine a situation to which these words might be applied as distinguished

from a state of facts to which the provisions of the 3d clause, if it were valid, could be applicable, or to a state of facts to which the provisions of the 12th clause would be applicable.

This bill of lading is a general form of an export bill of lading covering shipments of any class of goods from Galveston to Portland, and applies to the vast variety of transactions of this busy age. It is doubtless true that the committee on the preparation of this bill of lading strove to catch the shipper, turn whichever way he would. But we submit that as applied to the facts of this case, such committee has been wholly unsuccessful.

The defendant has singled out a single phrase in a sentence of the opinion in the Court below, viz.:

> "It may be that such change [from carrier
> " to warehouseman] would take place when
> " the property was awaiting conveyance by
> " the connecting line which had been notified
> " to receive and convey it," &c.,

and attempts to build up an argument on this. But such expression was wholly *obiter*. No such state of facts exists in this case, and this Court was for the moment evidently forgetful of the fact that no usual course of business was possible between these carriers owing to the secret arrangement made by them behind the back of the shippers that delivery could be made and accepted at any time and that the Steamship need not go to Westwego for less than 2,000 bales of cotton.

Second Point.

While the cotton was in the possession of the Railway Company fire was not an excepted peril.

The degree of care and attention given to this bill of lading has been already commented upon, and it is, we submit, a controlling fact that in the conditions which this committee of carriers devised with

respect to the service *until* delivery at the Port of New Orleans fire is not mentioned, while on the other hand, in the conditions with respect to the service *after* delivery at the Port of New Orleans, this risk of fire, certainly the most frequent source of loss, the greatest peril to which cotton is exposed, is very carefully guarded against.

The persons who drew this bill of lading certainly knew how to express themselves when they wished to guard against any particular peril, for as to fire *after* delivery at the Port of New Orleans the bill of lading says:

> "That the carrier shall not be liable for loss or damage occasioned by fire from any cause or wheresoever occurring" (p. 82).
>
> * * * * *
>
> "Also, that merchandise on wharf awaiting shipment or delivery be at shipper's risk of loss or damage by flood not happening through fault or negligence of the owner, master, agent or manager of the vessel" (p. 83).

Can there be any stronger proof of the fact that fire was not intended to be included among the risks excepted while the cotton was in the hands of the land carrier than that—

1. It is *not* mentioned in the excepted risks of the land carrier, and

2. It *is* mentioned and most carefully guarded against in the excepted risks of the steamship carrier.

The language of this Court in *Liverpool Steam Co.* vs. *Phenix Ins. Co.*, 129 *U. S.*, 397, *at p.* 463, is peculiarly applicable to this point. In that case the Court, speaking of the right of a carrier to the benefit of an insurance clause contained in the bill of lading, says:

> "The through bills of lading of the cotton are signed by an agent of the railroad companies and the steamship companies, 'severally, but not jointly,' and contain, in separate columns, two entirely distinct sets of 'terms

> and conditions'—the first relating exclusively to the land carriage by the railroads and their connections, and the second to the ocean transportation by the steamship. The clause relied on * * * [stating it] is inserted in the midst of the terms and conditions defining the liability of the railroad companies, and is omitted in those defining the liability of the steamship company, *plainly signifying an intention that this clause should not apply to the latter.*"

If it had been intended that cotton on the wharf of the railway company and before it got into the hands of the steamship company and awaiting shipment or delivery, should be at shipper's risk of loss or damage by fire, the bill of lading would undoubtedly have so recited.

Plain language to express plain ideas is not lacking in this bill of lading.

This bill of lading, drawn with open eyes, was evidently *a bid by one of several competing railroads for cotton trade*, and *exemption from loss by fire was intentionally refused* to the land carrier. Various perils for loss from which the land carrier should not be held liable are specified, *but there is absolutely no reference to fire, a peril* which is constantly before the minds of carriers, and particularly of those roads which handle quantities of cotton, *and which was before the minds of the drawers of this bill of lading*, as shown by its insertion in other parts thereof.

The whole construction of this bill of lading demonstrates that it was not intended that the land carrier should be exempted from loss by fire. What it contains and what it fails to contain are both conclusive on this point.

It is not reasonable to suppose that a carrier, in drawing a general form of a bill of lading to be used in connection with the general shipment of goods from any number of different points, *will pass over such an important and much feared peril as fire and omit to enumerate it among its specific exemptions*,

unless it be the intention not to include it in such exemptions. It is not reasonable to suppose that a carrier will depend for relief from loss by fire upon a general exemption, the effect of which, to say the least, might be questioned.

This view is emphasized by the fact that fire was a peril which was in the minds of the makers of this bill. *They expressly exempted the ocean carrier from loss by fire, and expressly omitted to exempt the land carrier therefrom.*

That was the effect of the bill of lading, and that was the intent.

An exemption, however, which will operate to relieve this defendant from liability for loss by fire must be clearly expressed in the bill of lading, so clearly in fact that a shipper on reading the bill would understand that fire was one of the excepted perils.

> "In order * * * to effect * * * a limitation [of liability], it is well settled, as the rule itself clearly indicates, that *the contract by which the exemption is secured must be clear, special and express. The immunity cannot arise from inference or from the use of general or ambiguous terms.*"
>
> *Hutch. on Car.*, § 237 *A*, *citing cases.*

The effect, however, of the insertion in contracts of this character of a group of particular exemptions, as contained in clause 1 of this bill of lading, is not confined to the particular clause in which they are inserted, but operates throughout the whole contract to limit and restrict the meaning of general words thereafter inserted.

> "General words of exemption when used after a specification of particular exemptions and risks will be presumed to include only those of a similar character unless a different intent appear."
>
> *Lawson on Carriers*, § 150.

"Particular exemptions are not enlarged by general language, and when the particular dangers or risks against which the carrier has specifically guarded in his receipt are followed by more general and comprehensive words of exemption the latter are to be construed to embrace *only* occurrences *ejusdem generis* with those previously enumerated, unless there be a clear intent to the contrary."

Hutchison on Carriers, § 276.

See also

Menzell v. *Railway Company*, 1 *Dillon*, 531.

Zimmer vs. *New York Central & H. R. R.*, 42 *N. Y. State Rep.*, 63.

The G. R. Booth, 62 *U. S. App.*, 407.

Having enumerated in clause 1 the specific exemptions of which the land carrier is to be allowed the benefit, this defendant cannot claim the benefit of any *other* exemptions unless they be added *by express language*. *Expressio unius, exclusio alterius.*

Therefore, unless the land carrier be specially exempted from loss by fire by a clear, special and express provision, it cannot claim exemption therefrom.

Menzell vs. *Railway Company*, 1 *Dillon*, 531, was an action brought to recover from the defendant railway company the value of certain goods alleged to have been delivered to it as a common carrier, for transportation from Marshalltown, in Iowa, to Oshkosh, in Wisconsin. The answer admitted the delivery of the goods to the defendant and set up a special contract, signed by the plaintiff, by which "in consideration of the company transporting the property to Chicago station," the plaintiff "does hereby release the said company, and each and every other company, over whose lines said goods may pass to destination, from any and all damages that may occur to said goods, arising from leakage or decay, chafing or breakage, or from any other cause not the result of collision of

trains, or of cars being thrown from the track while in transit." The answer also alleged that in course of transportation at Chicago it was necessary to put the goods in defendant's warehouse or freight depot at that place, and that while there the building accidentally took fire and the goods were destroyed.

And the Court after holding that the shipper and the company might, by contract, limit the common law liability of the latter, says:

> "Therefore, if the plaintiff, for a consideration, had knowingly entered into a contract with the company, specifically releasing it from all liability for loss of the goods by accidental fire, without fault on its part, while in transit, such a contract, it is conceded, would be binding upon the plaintiff. But did the plaintiff in this case make any such contract? This involves a construction of the special contract set up by the company. The language is, '*I hereby release said company from any and all damage that may occur* to said goods, arising from leakage or decay, chafing or breakage, *or* (and this is the language relied on) *from any other cause not the result of collision of trains, or of cars being thrown from the track while in transit.*'
>
> *Construing this* general and indefinite *language conformably to the rules adopted by courts in the interpretation of contracts of this kind, it is my opinion that it does not* plainly or satisfactorily appear therefrom that the parties intended thereby to exempt the company from liability for a total loss or destruction of the goods by fire while in the warehouse of the company or at an intermediate station on the line of transportation; and, therefore, this agreement (admitting that it was knowingly entered into by the plaintiff and founded upon a sufficient consideration) does not relieve the company of liability for the loss of the goods by fire, even though the fire were accidental and without fault on the part of the company, its agents or servants."

Fire was not a peril *ejusdem generis* with those particularly mentioned, and although the clause re-

lied on by the company was of the broadest kind, viz.:

> "from *any other cause* not the result of collision of trains, or of cars being thrown from the track while in transit,"

it was a general exemption following particular ones, and so could not operate to exempt the defendant from loss by fire.

In the case at bar as in the *Menzell case* the goods were in defendant's freight depot, and the case cited is directly applicable to the case at bar. The use of the words "nor in any other respect than as warehousemen" in the bill of lading in question, does not plainly or satisfactorily indicate that the parties thereby intended to exempt the company from loss by fire.

The change from carrier to warehousemen does not enlarge the scope or number of the excepted perils; it only changes the degree of care which the person in possession must exercise to escape liability from the perils mentioned.

Zimmer vs. *The New York, &c., R. Co.*, 42 N. Y. St. Rep., 63, was an action brought to recover the value of a horse which defendant was transporting under a contract, one of the conditions of which was that "neither this company, nor any of its connections, shall be liable for any injuries which the animals, or either or any of them, may receive in consequence of any of them being wild, vicious, unruly, weak, or of escaping, maiming themselves or each other, or in consequence of heat suffocation, or other ill effects of being crowded either upon cars or in yards, or on account of being injured by the burning of hay, straw or any other material for feeding the stock, *or in any way*," and the Court said:

> "The horse was struck by an improperly managed engine. Nothing of that kind is provided against in the contract, unless the words '*in any way*' so provide. These are

broad and general words, and they may operate without including this case. In the connection in which they are used they may be construed to mean 'or burning in any way,' the whole clause being 'or on account of being injured by the burning of hay, straw, or any other material for feeding the stock, or in any way.' *If they were intended to mean injured 'in any way' the intention is not clearly expressed*, and therefore may be rejected."

It must be borne in mind that in the case at bar the land carrier is expressly entitled to the benefit of all the particular exemptions contained in the bill of lading "*until delivery* at the port of New Orleans"; the benefit of these particular exemptions does not end when the cotton, before delivery, is "awaiting further conveyance." According to defendant's contention, however, when the cotton is "awaiting further conveyance," but is not delivered, it is not liable for loss from certain particularly enumerated perils, and is not liable except as warehousemen for any loss, no matter how caused, a somewhat anomalous construction.

If it had been the purpose of clause 11 to relieve the carrier from liability except as warehouseman from any and all causes of loss or damage while the cotton was "waiting further conveyance," certain particular exemptions would not have been expressly enumerated and made to continue in force after the cotton was "awaiting further conveyance," since that period would be covered by the general clause. If that had been the purpose, the particular exemptions would have ceased by their terms when the property was "awaiting further conveyance" and the general clause, by its terms, became operative.

If the effect of this eleventh clause be to exempt the carrier from liability except as a warehouseman for loss or damage from *any* cause "while the said

property awaits further conveyance," it takes, during that time, the place of every other clause in the bill of lading, which other clauses are expressly stated to be operative not only "while said property awaits further conveyance," but even further and "*until delivery* at the port of New Orleans."

Concededly the defendant was not exempted from loss by fire as a carrier, nor did it relieve itself from the loss by fire while the cotton was "waiting further conveyance." Its liability was that of a warehouseman only in respect of loss or damage caused by perils *ejusdem generis* with those particularly enumerated, that is to say, *the general words did not enlarge the specific exemptions and did not include any further exemptions,* except those of the same general character as such specific exemptions.

As carrier, this defendant, "*until delivery* at the port of New Orleans," was not liable for loss or damage from causes particularly enumerated. As warehouseman, while the cotton was "awaiting further conveyance" this defendant was not liable, in the absence of negligence, for loss or damage caused by any perils which were *ejusdem generis* with those particularly enumerated, but there the exemption ended; it did not include or cover any further cause of loss.

To hold otherwise is to import a new term into this bill of lading and to construe it, not strictly against the railroad, the party who prepared it, but strictly against the shipper, who was required to receive it.

A further authority on this point is The *G. R. Booth*, 62 U. S. App., 407, wherein the Court said, at page 410:

> "The bill of lading reads as follows: 'The ship and carrier shall not be liable for loss or damages occasioned by the perils of the sea or other waters, by fire from any cause or wheresoever occurring, by barratry of the master or crew, by enemies, pirates, robbers or thieves, by arrest and restraint of princes,

rulers or people, by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, by collision, stranding or other accidents of navigation, of whatsoever kind, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowner; nor for any loss or damage caused by heat, decay, putrefaction, vermin, rust, sweat, change of character, shrinkage, leakage, breakage; nor for any loss or damage arising from the nature of the goods or the insufficiency of the packages; nor for any country damages; nor for the obliteration, errors, insufficiency or absence of marks or numbers, address or description; nor for risk of craft, hulk or transshipment; nor for any loss or damage caused by the prolongation of the voyage; *nor for any loss or damage occasioned by causes beyond his control.*' It is upon the last clause that the appellee relies, and the contention is that the explosion having been without negligence on the part of the carrier, the damages in question are a 'loss or damage occasioned by causes beyond his control.'

Manifestly the clause was not intended to relieve the carrier for any loss or damage whatever occasioned by causes beyond his control, and without negligence; otherwise it would take the place of nearly every other cause of loss and damage specifically mentioned in the preceding clauses of the contract. Loss or damage occasioned by the perils of the sea would be occasioned by causes beyond the control of the carrier; so would losses arising by accidents of navigation of whatsoever kind; so would losses or damage arising from the nature of the goods; so would losses arising from insufficiency of address or description, and so would losses caused by the (unavoidable) prolongation of the voyage. *If it had been the purpose of the clause to relieve the carrier from liability occasioned by any of these causes they would not have been made the subject of particular enumeration. Some effect must be given it, but the instrument, having been prepared by the carrier, is not to*

> *be extended in his favor beyond the strictest meaning of its terms. This can be done by reading it as intended to apply to causes of loss* EJUSDEM GENERIS *with those particularized; and we think it exempts the carrier* ONLY *from other causes of loss or damage of a like nature to those enumerated and beyond his control.*"

The very language of this opinion, as well as the principle therein laid down, applies to this case.

It being well settled law that carriers cannot claim through the use of general expressions exemption from losses not of the same general nature as those specifically enumerated, we submit that the carrier by land did not in this bill of lading secure exemption from loss by *fire*.

This construction is reasonable and consistent, and should therefore be adopted by the Court. As was said by Judge Wallace, in construing a carrier's receipt, in *Ayres v. The Western Railroad Corporation*, 14 *Blatchford*, 9:

> "This construction is consistent with the instrument as a whole, with the relations of the various parties to it, and with the nature of the transaction the receipt is intended to provide for. *If the meaning of the conditions were doubtful, the construction to be given them should be the one most strongly against the carrier.* The conditions are designed to relax the common law liability of the carrier—a liability which the shipper has a right to insist upon, and of which he is not to be deprived without clear evidence of his assent. *If the meaning of such conditions is involved in any doubt, the doubt is to be resolved in his favor.*"

And this bill of lading, which was prepared by the carrier, presents, as stated by Judge Shiras in the case of *Wilson* v. *Cooper*,

> "*a case for the application of the general rule that where one party prepares the contract*

and the other accepts it, as thus prepared, if there is doubt as to the construction of any of the clauses therein contained the interpretation MUST *be against the party who prepared the contract.*"

95 *Fed. Rep.*, 625, *at p.* 628.

Third Point.

The verdict for the shippers was rightfully directed and the judgment should be affirmed.

FREDERIC E. MYGATT,
GEORGE RICHARDS,
TREADWELL CLEVELAND,
Of Counsel.

Supreme Court of the United States.

No. 77.—October Term, 1901.

The Texas & Pacific Railway Company, Plaintiff in Error, vs. Emil Reiss et al. } In error to the United States Circuit Court of Appeals for the Second Circuit.

[January 13, 1902.]

This action was brought in the Circuit Court of the United States for the Southern District of New York by the plaintiffs, who are defendants in error here, and are residents of Liverpool, England, to recover the value of some two hundred bales of cotton destroyed by fire at Westwego, Louisiana, opposite the city of New Orleans, November 12, 1894, at a pier on the west bank of the Mississippi River, owned by the plaintiff in error. This is the same fire which is mentioned in *Texas & Pacific Railway Company* v. *Clayton*, (173 U. S. 348.). Upon the first trial the court directed a verdict in favor of the defendant, but the judgment entered thereon was reversed by the Circuit Court of Appeals, (98 Fed. Rep. 533,) and a new trial granted. Upon the second trial the court, following the opinion of the Circuit Court of Appeals, directed a verdict for the plaintiffs for the value of the cotton, and the judgment entered upon that verdict having been affirmed by the Circuit Court of Appeals on the authority of its former opinion, (99 Fed. Rep. 1006,) the railway company brings the case here by writ of error. The defense of the company is based upon a clause in the bill of lading which will be set out hereafter.

The cotton had been shipped at Temple, in the State of Texas, on the Missouri, Kansas and Texas Railway, to be carried over its road and the defendant's road to New Orleans, and from that port to Bremen. It arrived at New Orleans at the pier of the railway company November 6, 1894. One hundred and sixty bales were unloaded on November 7, and the balance soon thereafter, but on what day is not certain. One hundred and twenty bales were unloaded and placed at one point, and two different lots of forty bales each were deposited at other points, thus leaving the cotton at three different points on the pier of the railway company. At this time the pier was quite full, there being over twenty thousand bales deposited upon it and some eight thousand bales in cars waiting to be unloaded. The pier was built, owned and in the exclusive possession of the railway company. The bill of lading which was issued at Temple, in the State of

Texas, by the Missouri, Kansas and Texas Railway, expressed on its face to be on behalf of that company and also the defendant company and the steamship company. It was an elaborate document, and purported to be "an export bill of lading approved by the permanent committee on uniform bill of lading." It acknowledged the receipt of the cotton consigned as marked and to be carried to the port of New Orleans, Louisiana, and thence by the Elder, Dempster & Company's steamship line to the port of Bremen, Germany. It had conditions which are stated to be:

"(1) With respect to the service until delivery at the port of New Orleans, Louisiana."

"(2) With respect to the service after delivery at the port of New Orleans, Louisiana."

There are twelve clauses relating to the service until delivery and fifteen clauses relating specifically to the service after delivery at the port of New Orleans. Those clauses which are specifically referred to in this case are numbered 3, 11 and 12 in the bill of lading. They read as follows:

"3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. . . ."

"11. No carrier shall be liable for delay, nor in any other respect than as warehousemen, while the said property awaits further conveyance, and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer, of the ocean line above stated, leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer.

"12. This contract is executed and accomplished, and all liability hereunder terminates on the delivery of the said property to the steamship, her master, agent or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien due and payable by the steamship company."

The usual method of handling cotton upon its arrival at the pier of the company at Westwego, Louisiana, is stated, as both counsel in this case agree, with substantial accuracy in *Texas & Pacific Railway Company* v. *Clayton*, (173 U. S. 348, 352,) as follows:

"The mode in which the railway company and the steamship company transacted business was as follows: Upon the shipment of cotton, bills of lading would be issued in Texas to the shipper. Thereupon the cotton would be loaded in the cars of the railway company and a way bill indicating the number and initial of the car, the number of the bill of lading, the date of shipment, the number of bales of cotton, the consignor, the consignee, the date of the bill of lading, the number of bales forwarded on that particular way bill, the marks of the cotton, the weight, rate, freights, amount prepaid, &c., would be given to the conductor of the train bringing the car to Westwego. Upon the receipt of the way bill and car at

Westwego, a 'skeleton' would be made out by the clerks at that place for the purpose of unloading the car properly. It contained the essential items of information covered by the way bill, and had also the date of the making of the skeleton. When this skeleton had thus been made out and the car had been pushed in on the side track in the rear of the wharf, it would be taken by a clerk known as a 'check clerk,' and with a gang of laborers, who actually handled the cotton and were employed by the railway company, the car would be opened; and as the cotton was taken from the car bale by bale the marks would be examined to see that they corresponded with the items on the skeleton, and the same were then checked. The cotton thus taken from the car was deposited at a place on the wharf designated by the check clerk, and it would remain there until the steamship company came and took it away. After the checking of the cotton in this way to ascertain that the amounts, marks and general information of the way bill were correct, the skeleton would be transmitted to the general office of the Texas and Pacific Railway Company in New Orleans, which thereupon would make out what was designated as a 'transfer sheet' that contained substantially the information contained in the way bill, and which being at once transmitted to the steamship company or its agents was a notification understood by the steamship company's agents that cotton for their line was on the wharf at Westwego ready for them to come and take away. Upon the receipt of these transfer sheets the steamship company would collate the transfers relating to such cotton as was destined by them for a particular vessel, advise the railway company with the return of the transfers that this cotton would be taken by the vessel named, and would thereupon send the vessel with their stevedores to the wharf at Westwego. The clerk at Westwego would go around the wharf and by the aid of the transfers returned from the steamship agents point out to the master or mate of the vessel, or the one in charge of the loading, the particular lots of cotton named in the transfers and designated for his vessel, and the stevedores and their helpers would thereupon take the cotton and put it on board the ship. In connection with the loading upon the vessel or after the cotton was pointed out in lots, the master or mate would sign a mate's receipt for this cotton. The stevedores and all men employed in loading the vessel were wholly in the employ of the steamship company. The time of coming to take cotton from the wharf was entirely in the control of the steamship company. They sent for it as soon as they were ready."

At the time of the fire it is conceded that no transfer or skeleton sheets had been sent to the steamship company or notice given it of the arrival of this cotton at the pier of the railway company.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

In this case there had been no delivery of the cotton by the railway company prior to its destruction by fire. The cotton had arrived at the pier of the railway company but no notification of its arrival had been given to the steamship company, nor was it in fact in the possession of nor had it been delivered to the latter company. It was still under the

absolute control and in the possession of the railway company, and nothing had been done to terminate its common law liability at the time the fire occurred.

In *Myrick* v. *Michigan Central Railroad Company*, (107 U. S. 102,) Mr. Justice Field, delivering the opinion of the court and speaking of the duty of a connecting carrier, at page 106 said:

"If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier, that of a forwarder by the connecting line; that is, to deliver safely the goods to such line,—the next carrier on the route beyond."

As between intermediate carriers, the duty of the one in possession at the end of his route is to deliver the goods to the succeeding carrier or notify him of their arrival, and the former is not relieved of responsibility by unloading the goods at the end of his route and storing them in his warehouse without delivery or notice to or any attempt to deliver to his successor. (*McDonald* v. *Western Railroad Company*, 34 N. Y. 497; *Congdon* v. *Marquette H. & O. Railroad Company*, 55 Mich. 218.) In the latter case it is held that the duty of the connecting carrier is not discharged until it has been imposed upon the succeeding carrier, and this is not done until there is delivery of the goods, or at least until there is such a notification to the succeeding carrier as according to the course of business is equivalent to a tender of delivery.

Within these cases it cannot be claimed that this defendant had either actually or constructively delivered the cotton to the steamship company at the time of the fire. The defendant is compelled, therefore, to have recourse to the clauses in the bill of lading in its attempt to rid itself of liability consequent upon the destruction of the cotton by a fire while at its pier and in its possession. The bill of lading itself is an elaborate document, bearing on its face evidences of care and deliberation in the formation of the conditions of the liability of the companies issuing it. The language is chosen by the companies for the purpose, among others, of limiting and diminishing their common law liabilities, and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their officers or agents prepared the instrument, and as the court is to interpret such language, it is, as stated by Mr. Justice Harlan, in delivering the opinion of the court in *National Bank* v. *Insurance Company*, (95 U. S. 673, 679): "Both reasonable and just that its own words should be construed most strongly against itself." To the same effect is *London Assurance &c.* v. *Companhia &c.*, (167 U. S. 149, 159,) and *Queen of the Pacific*, (180 U. S. 49, 52.)

We come then to an examination of the bill of lading for the purpose of determining whether the railway company has been exempted from liability by any of its provisions.

We do not understand it is contended that either clause 3 or 12 applies, because, as is conceded, there was never any notification given the steamship company of the arrival of this cotton. Without that notification counsel does not contend that either of those clauses applies. The argument at the bar was devoted to maintaining the proposition that the railway company was exempted under clause 11, and the other clauses in the bill of lading were referred to for the purpose of giving point to that contention. It was urged at the bar that under the eleventh clause the question of notification was immaterial, because, although a notification had not been given, yet the cotton, upon its arrival at the pier and after it had been unloaded from the cars, "awaited further conveyance," within the meaning of the eleventh clause, and while awaiting further conveyance the carrier was by the express terms of that clause relieved from liability otherwise than as warehouseman. In other words, that the carrier upon the arrival of the cotton and unloading it at the pier, and without giving any notification of its arrival, ceased to be a carrier and became liable only for negligence which might cause the loss of the property, and there being no negligence proved in this case, the carrier was not liable.

It was argued that clauses 3 and 12 were intended to cover such a case as would have existed in the one now before us had notice been given to the steamship company of the arrival of the cotton at Westwego, such notice being understood by the steamship company as a request to come and take away the cotton, and in holding, as the court below did, that notification was necessary before the eleventh clause could apply, that clause was thereby deprived of any separate effect, because after notification the third or the twelfth clause would exempt the carrier, and therefore some further or other meaning must be given the eleventh clause, so that it may operate in a case where no other clause would be available.

Upon this subject Circuit Judge Shipman, in the court below, said:

"It is not claimed that the facts bring the carrier's liability within clause 3 of the bill of lading, which says that the liability shall end after the property 'is ready for delivery' to the next carrier, for it is conceded that the goods are not awaiting delivery before any notification of their arrival to the connecting carrier. (*McKinney* v. *Jewett*, 90 N. Y. 267.) It is, however, insisted that the fair construction of clause 11 is that, when the act of transportation of the cotton to the wharf at Westwego has been accomplished, and it has been stacked on the wharf, and 'is awaiting further action in the way of notification and advice to the succeeding carrier,' it awaits further conveyance. By this construction the parties substituted an immediate cessation of the liability of a carrier, and the assumption of the liability of a warehouseman for the liability imposed by the common law, and doubtless they were at liberty to make a contract of limitation

which will be enforced if the language of the bill of lading clearly indicates that such was their intention. In order to justify the defendant's construction, the claimed extent of the departure from the implied contract of the common law must clearly appear in the language which is used in the special contract. The clause, 'no carrier shall be liable for delay,' when applied to the facts in this case, meant that the defendant should not be liable for the delay of the steamship company, but delay would not occur until it knew or had heard of the time of arrival of the cotton. The same idea of notification to the connecting line must also run through the entire paragraph, and, while the term 'awaiting further conveyance' literally means 'awaiting the time when the next carrier shall take the property in hand,' it seems improbable that it was the intent of the language that the liability of the carrier should terminate upon the deposit of the property upon the wharf. The language is too indefinite to support the conclusion that notice to the connecting line was not a prerequisite to the change of liability to that of a warehouseman. It may well be that such change would take place when the property was awaiting conveyance by the connecting line which had been notified to receive and convey, but until then it is not awaiting conveyance; it is awaiting the action of the first carrier. The term must mean awaiting conveyance by the person upon whom the duty of conveyance devolved, and no such duty devolved until notice of the arrival of the property had been given."

We agree with the views of the court below, as expressed by Judge Shipman. We do not think that the property can be said to await further conveyance the moment it is dragged upon the pier of the railway company and unloaded from its cars, and before any notification is given to the steamship company that the cotton has arrived and awaits transportation by ship. In one sense it might be said that property awaited further conveyance if anywhere along the line of the railway company an engine of the train should break down, and the train be brought to a standstill for several hours, awaiting a new engine. In such case the cotton would not have arrived at the termination of the road of the railway company, and in one sense it would certainly be awaiting further conveyance, because it had not arrived at the end of the route; but no one would suppose for a moment that during the time that the train was thus at a standstill the eleventh clause of the bill of lading would be applicable. No court would give such a construction to the clause as would exempt the company under the circumstances stated.

We are then to look for some fair and reasonable meaning to be given to the term, and we think that the court below has given such meaning to it. It cannot reasonably be said that within the meaning of that clause the property awaits further conveyance the moment it has been unloaded from the cars on to the pier of the defendant. As is stated by the Circuit Court, at that time the property awaits the further action of the defendant, and does not await further conveyance until it has become the duty of the succeeding carrier to take it further, after notification that it has arrived and

awaits delivery to it. After that time it may be said to await further conveyance, but up to that time it awaits the further action of the railway company.

This meaning of the clause is not altered even if the language used in other clauses might also grant exemption upon the same facts. We are not for that reason bound to find some other and different meaning for the eleventh clause than such as we think is obvious and plain upon its face. The various propositions mentioned in these different clauses and the many contingencies provided for therein under which the company might claim exemption render it not surprising that the same ground of exemption should possibly be covered by more than one provision in the bill, or that, in other words, the defendant should upon the same facts be exempt under more than one of its various and perhaps somewhat indefinite clauses. No rule of construction binds us to find some hidden or obscure meaning for a particular clause, because the simple and plain one which is seen upon its face provides for contingencies which may be also provided for in another clause of the same bill.

Reference was made in the opinion of the court below and also upon the argument in this court to the case of *McKinney* v. *Jewett*, (90 N Y. 267,) in relation to a delivery of goods at the termination of the carriage, where the meaning of the phrase "awaiting delivery" was under consideration, the court holding that the phrase implied not only the arrival of the goods but the completion of whatever on the part of the carrier is necessary to be done to leave the risk of further delay upon the consignee; that the goods were "awaiting delivery" only after the duty of the common carrier is done and he is entitled to remain passive awaiting the action of the consignee.

It was objected on the argument at the bar that the case was not in point because of the distinction between awaiting delivery and awaiting carriage, and it is urged that this difference is substantial; that conveyance and delivery are different acts and relate to different parts of the service; that there could be no delivery to the consignee under the New York case until there had been notice in some form to the consignee, while the element of notice had no connection with the act of conveyance of the cotton, which might be entirely complete regardless of notice. The two cases differ, in that the New York case, as counsel says, relates to a delivery at the end of the route, and the case at bar relates to goods awaiting conveyance by a connecting carrier, but in both the question arises as to the meaning of the term "await," and the New York case holds that goods do not await delivery within the meaning of that term as used in the bill of lading until notice of their arrival has been given the consignee, and it seems to us that the same reasoning holds here, and that goods are not awaiting further conveyance by a connecting carrier until

the preceding carrier has given him notice of their existence at the place where further conveyance is to be continued. We do not dispute that there is a distinction between the position of goods awaiting delivery and those awaiting further conveyance, and the fact of such distinction is recognized in *Railroad Company* v. *Manufacturing Company*, (16 Wall. 318, 327,) and it is therein stated that there is a clear distinction between property in a state to be delivered free to the consignee on demand and property on its way to a distant point to be taken thence by a connecting carrier. In the former case it might be said to be awaiting delivery; in the latter to be awaiting transportation. But the analogy between goods awaiting delivery at the end of the route and goods awaiting further conveyance by a connecting carrier, so far as the requisite of notice in each case is concerned, we think exists and should be recognized.

There having been in this case no notification to the steamship company, without which clauses 3 and 12 do not apply, and we being of the opinion that clause 11 has also no application without notification to the steamship company, it follows that the exemption claimed under the bill of lading is not sustained; that the defendant at the time of the fire was under obligation as a common carrier and liable for the destruction of the cotton, and that the judgment in favor of the plaintiff below was right, and must be

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.